Ontario

The Ontario Lieutenant Governor's Board of Review

by

The Honourable Edson L. Haines, Q.C.
Chairman

Third Edition
1984

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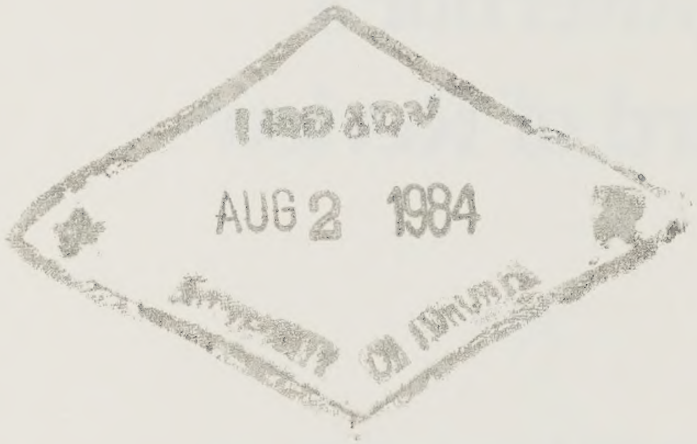

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The Lieutenant Governor's
Advisory Review Board
Conseil consultatif de révision
du lieutenant-gouverneur

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The Honourable John Aird, Q.C.
Lieutenant Governor of Ontario

Your Honour:

Many changes have occurred since the publication of the last Monograph.

1. Your Board has come under the Criminal Code of Canada and now has the powers of investigation under sections 4 and 5 of the Federal Inquiries Act. This brings us into line with all other Boards of Review in Canada.
2. The Charter of Rights and Freedoms has been proclaimed requiring a re-examination of old procedures and the fashioning of new.
3. The Ministry of Health has instituted a Patient's Advocate Programme which provides trained personnel in each Psychiatric Facility to counsel and advise the patient and act as liaison between the patient, the hospital and others.
4. In keeping with evolving concepts of fundamental justice, your Board has introduced new procedures. They are: a system of patient's access to his clinical records and the Board files on terms that protect information gained in confidence while disclosing it to the patient's lawyer: and the institution of a Consultant Programme whereby a Consultant examines the patient, makes an independent report to the patient and the Board, and appears at the hearing and testifies.

A new edition of the Monograph is appropriate. It is a manual of your Board procedures and a collection of materials for the use of patient, lawyers, judges, Administrators, Legislators, and members of the public; indeed, anyone interested in the Board operation. Here is to be found a complete description of the Lieutenant Governor's Warrant system. One sees how the Board goes about its delicate task of balancing the rights of the patient with the rights of the public to be protected. It is a most unique and unusual task and I pay tribute to those dedicated members of the Board for their efficiency and objectivity. For myself, it exceeds the challenge of the Bench.

Yours truly,

E. L. Haines

The Honourable Edson L. Haines, Q.C.
Chairman,
The Lieutenant Governor's
Board of Review.

ELH:gc

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Introduction

The mental health care system is in a state of transition. Nowhere is it better illustrated than in the cases of those found not guilty of reason of insanity and as a result have been made Wards of the Lieutenant Governor. They are a special class of patient. Charged with murder or some similar act of personal violence, they have been acquitted, and thereafter, have been detained at the pleasure of the Lieutenant Governor until they have recovered from their mental illness and are permitted to enter society on terms calculated to protect both the patient and society. Prior to 1967, all of these patients were kept in strict custody in a mental hospital. Only a handful were released. Today, there are over 400 patients on Warrants and their numbers are being added to at a rate of 50 to 70 per year. All of them can look forward to psychiatric treatment and supervised detention according to their mental illness, and eventually the majority can expect their Warrants will be vacated or loosened on terms that will permit them a reasonable lifestyle amongst their fellow men. Our society can be assured that every effort has been made, through treatment, to stabilize these patients so that the risk of antisocial behaviour has been substantially reduced and that they can function at the level of an ordinary citizen.

The transition from violent offender who was not punished because he or she was so insane that he could not appreciate the nature or quality of his act or know it was wrong into a socially responsible person bears impressive testimony to the good judgement involved in the establishment of the Ontario Lieutenant Governor's Warrant System. It also reflects credit on those dedicated men and women in the Health Care Services, without whom such transition would be impossible. To them, I would like to pay a special tribute. Their work is demanding and exhausting and at times, downright frustrating. Aided by modern drugs and new therapies, their task is made lighter, but in the last analysis, it is the personal relationship between staff and patient that enables the patient to gain insight into his mental condition, the factors which have contributed to it, and thereby to develop a level of socially acceptable behaviour.

The Lieutenant Governor must see that the patient's treatment meets the optimal standard of care established in the field of psychiatry so that eventually the results of treatment will be such as to protect the public from the behavioural effects of the patients' mental illness. That is a continuing obligation which cannot be assigned. The Lieutenant Governor has not the expertise to discover and analyse the relevant factors leading to changes in the Warrant. So, under the Statutes the Lieutenant Governor has appointed a Board of experts to consider the case of each patient and report regularly upon the recovery of the patient and upon what is in his or her best interest and what is in the best interest of the public. This is called the Lieutenant Governor's Board of Review. The object of this Monograph is to acquaint you with the Lieutenant Governor Warrant system, the operation of the Board of Review and to comment on some important aspects that will contribute to your understanding and assist you whether you become a part of the process or are an interested citizen.

Chapter I is entitled "The Ontario Lieutenant Governor Warrant System". There you see it in perspective. Along with it you might read a very thoughtful Paper by Dr. Ronald Stokes, the Medical Director of the Mental Health Centre, Penetanguishene. It is found in Appendix F and is entitled the "Real World". Also, you might read a companion Paper by Mr. L.W. McKerrow, the Administrator of the Mental Health Centre, Penetanguishene, it is found in Appendix G and contains a description of the programmes in that institution.

Chapter II is entitled "The Ontario Lieutenant Governor's Board of Review." Here you will find a complete description of the operations of the Board, how it assimilates its information and reports to the Lieutenant Governor. It travels throughout the Province reviewing the cases of the patients in their psychiatric facilities. You will be interested to learn that in the office of the Board at Toronto, a centralized system of records is maintained. The patient's case is always open and the patient, his or her solicitor, or psychiatrist may examine them on appropriate terms as to the protection of the patient and third parties. The Board is composed of 48 members, including a retired Supreme Court Judge as Chairman, an active Supreme Court Judge as alternate Chairman, together with psychiatrists, lawyers and lay persons. The psychiatrists are experienced forensic specialists and the lawyers are men with considerable trial experience. The lay persons represent a good cross-section of the community.

Chapter III is written especially for the patient. There are over 400 patients from every walk of life suffering from a variety of mental disorders. Some are recovering, others may be decompensating. Almost all were charged with the crime of murder, attempted murder,

or serious acts of violence. As you read this Chapter, try and visualize these patients. They could well be relatives in your family or they could be the offender who killed your neighbour. Each is an individual under treatment. Many think of themselves completely recovered when they are still seriously mentally ill. But each is entitled to a careful review and a following recommendation that will contribute to his or her recovery and protect society.

Chapter IV is written especially for the lawyers. One of the problems in Ontario is that we have never trained, until recently, a Mental Health Bar. Nevertheless a patient is entitled to a lawyer of his choice and here you will find a discussion of those matters helpful to the lawyer. The interchange between psychiatry and the law is heating up, and in many aspects, becomes a confrontation between the lawyer's concern about the patient's right to avoid or control his psychiatric treatment versus the psychiatrist's concern about the patient's right and need to treatment given in an informed fashion. The resolution between rights and therapy is by no means settled. In the meantime, the dedicated psychiatrists are becoming disillusioned and are withdrawing to less contentious fields. Often one hears a psychiatrist say "fifteen years ago, I spent 90% of my time treating patients and 10% in their legal problems; today, it is the reverse." This may be an overstatement, but of one thing I am certain, the introduction of a lawyer between the patient and his therapist interferes with therapy unless conducted with exquisite care. Cross-examination as to a physician's competence and credibility in the presence of the patient shakes the patient's confidence in his doctor and discourages the doctor in future treatment. It makes more difficult the task of the Board of Review. The system cries out for understanding, empathy and respect between the two professions.

Chapter V describes the role of the Patients Advocate. It is a new service made available by the Ontario Ministry of Health to assist the mental patient in understanding and resolving his problems without obligation on the part of the patient.

Chapter VI is entitled Patients Access to Clinical Records. Complete access to the patient may carry with it risks. Information gained in confidence must be protected. The debate on this issue will never be resolved satisfactorily to everyone. Here the practice of the Board of Review is explained.

Chapter VII is devoted to the Consultant Programme. This is a very important measure adopted by the Board in 1983. For the assistance of the patient and the Board, one of the psychiatric members of the Board does a complete examination of the patient and all relevant records, appears at the hearing, presents his report and is examined. He does a psychiatric audit of the case and expresses his opinion as he sees it. His

opinions are not binding on the patient nor on the Board, but they do give a valuable perspective. He does not sit on the Board hearing the case and retires when that Board goes into camera.

Chapter VIII is on The Sex Offender.

Then we turn to the appendices.

Appendix A is a summary of the original study done by Dr. Michael S. Phillips. It is entitled "Characteristics of Patients on Warrants of the Lieutenant Governor of Ontario". It is a "must" in reading material for anyone interested in learning the characteristics of these patients. Nothing like it exists in Canadian literature. It is a research Paper sponsored by the Department of Justice, the Ontario Ministry of Health, the Clarke Institute of Psychiatry, the Law Society of Upper Canada and the Metropolitan Forensic Services. In his own words, the author says:

> "It was felt that a study of every warrant patient in Ontario would provide for a better understanding of the system. Section II seeks answers to he following questions: What crimes were committed that resulted in the warrants? Were they placed on warrants because they were "Unfit to Stand Trial" or "Not Guilty by Reason of Insanity?" What kind of criminal and psychiatric pasts had they had? Who were the victims of the offences? In what institutions are these persons currently to be found and how tight is the supervision under which they are now kept? Before we can begin to think seriously about policy considerations regarding this particular class of patient, it is first necessary to have an up-to-date description of the entire population. This is what this study offers."

Appendix B is in two parts. The first contains the Reasons of the Chairman of the Advisory Review Board on the application of the patient Vance Egglestone. Part two is the Reasons for Judgment of the Divisional Court as reported in 1983 6 CCC (3rd) 1.

Appendix C is the format for the reports of the Administrators of psychiatric hospitals to the Advisory Review Board provided for the purposes of a patient's review.

Appendix D is the form required to be signed by the patient authorizing his lawyer or psychiatrist to examine certain portions of the Advisory Review Board files.

Appendix E is the form required to be signed by the patient's lawyer or psychiatrist before examining certain portions of the Advisory Review Board files.

Appendix F is a paper presented to the Eighth Annual Conference of Advisory Review Boards by Dr. Ronald Stokes entitled, "The Real World in a Maximum Security Hospital."

Appendix G is a description of the Oak Ridge programmes of the Mental Health Centre, Penetanguishene, by Mr. L.W. McKerrow, Administrator.

Appendix H is a Paper by Dr. Vernon L. Quinsey "On the Assessment of Sex Offenders at Oak Ridge".

Appendix I contains excerpts from the Criminal Code of Canada being sections 542 to 547.

Appendix J is the reported decision of the Ontario Court of Appeal in Regina vs. Saxell being (1980) 59 CCC (2d) 176.

Appendix K contains the Divisional Court judgment in the case of Abel vs. Director of Penetanguishene Mental Health Centre 1979 24 O.R. (2d) 279 and the judgment in the Court of Appeal 1980 31 O.R. (2d) 520.

Appendix L contains a copy of the Canada Act and the Canadian Charter of Rights and Freedoms.

Appendix M contains a copy of the Canadian Bill of Rights.

A review by the Lieutenant Governor's Board of Review is a careful and thorough inquiry by an independent Board of experts into the state of recovery of the patient and what is in the best interest of the patient and society. The Board is charged with the responsibility of doing all things necessary to enable it to come to a meaningful recommendation and is given the power to seek out the relevant information and appraise it. There is no onus of proof. Neither the patient, the hospital, the public, nor the board are cast in adversarial roles. There is a duty to act in accordance with the principles of fundamental justice.

The Board is engaged in a most sensitive and critical examination into the mental illness of the patient and the protection of the public. To arrive at a fair recommendation is like walking a tightrope delicately balancing the rights of the patient on the one hand with the rights of the public on the other. The Charter of Rights is an excellent statement of the rights of those involved with the law. The Board prides itself in being in the forefront. We who are charged with the task invite your understanding and sincere cooperation.

Finally, the great difference between the Regional Review Board and the Lieutenant Governor's Board of Review must be recognized. The Regional Review Boards function under the provision of the Ontario Mental Health Act. They deal with the rights of civil patients with respect to their involuntary admission to psychiatric facilities, their treatment, and their competency to manage their estates. The Lieutenant Governor's Board of Review functions under the provisions of the Criminal Code of Canada. It acts in an advisory capacity to the Lieutenant Governor in respect of those found not guilty of a criminal offence or found unfit to stand trial by reason of insanity.

This Monograph is both a manual and a collection of relevant materials. Every effort has been made to include in it as much information as possible. In the event you cannot find what you require, you are invited to write to the Lieutenant Governor's Board of Review, 700 Bay Street, 24th Floor, Toronto, Ontario M5G 1Z6, to the attention of Mrs. P.A. McRae, Executive Co-ordinator and Registrar.

The Honourable Edson L. Haines, Q.C.
Chairman
The Lieutenant Governor's
Board of Review.

April, 1984

Chapter 1

The Ontario Lieutenant Governor's Warrant System What is It?

When charged with an indictable criminal offence and found not guilty by reason of insanity, the Court does not discharge the accused but must order that he or she be kept in strict custody in the place and in the manner that the Court directs until the pleasure of the Lieutenant Governor of the Province is known. Thereupon the accused may become a lifetime ward of the Lieutenant Governor. Canadian law is quite different from that found south of the border where in some States an accused is acquitted and then is subject to an application to the Court for his detention and treatment. We take a much more serious view of the needs of the public to be protected from the accused's insanity and the needs of the accused to be treated for his insanity. Under the Criminal Code, the Lieutenant Governor has power in these circumstances to take away all of the personal liberty of the individual for an indefinite period, with no right of an appeal, and direct the terms of his detention. He has similar powers where the accused is found by the courts unfit to stand trial because of his insanity. The Criminal Code uses the term "pleasure of the Lieutenant Governor." Those terms connote virtually boundless discretion limited only by the legislative purpose underlying the statute. As was said by the Court of Appeal in Saxell: (1980) 59 CCC (2D) 176.

> "thus the fate of an accused who has been acquitted on account of insanity has been removed from the judicial process, and entrusted to the Lieutenant Governor under a code of procedure that ensures review at reasonable intervals of time by experts in the field of mental health".

In the same judgment the Court of Appeal said:

> "Society has a legitimate social interest in persons who have committed some serious social harm, but who have been found not to be criminally responsible on account of mental disorder; it is justified in subjecting those persons to further diagnosis and assessment, in exercising appropriate control over them, if necessary, and in providing them with suitable medical treatment. There is an underlying assumption that they remain a danger to the public because they have, in fact, committed some act which would have been a criminal act had they not been insane when the act was committed. It may well be that in individual cases that underlying assumption is not valid, but that does not mean that the legislative scheme, in itself, offends the right of equality before the law or authorizes or effects arbitrary detention or imprisonment".

Let us pause for a moment and consider the kind of insanity that permits a court to return a verdict of not guilty by reason of insanity. It is said that in his lifetime one person in eight will require psychiatric treatment for mental illness. And no doubt many who commit crimes are suffering from some sort of mental disorder, but that does not entitle them to escape punishment. It is only a small portion of the mentally ill whose illness is so grave and serious that they are held not accountable for their crimes. The Criminal Code provides:

> **"INSANITY — When insane — Delusions — Presumption of sanity.**
> **16. (1) No person shall be convicted of an offense in respect of an act or omission on his part while he was insane.**
> **(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.**
> **(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.**
> **(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane."**

So it will be seen that only an accused may be acquitted on account of insanity when "— he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong". In Ontario today, there are approximately 400 Lieutenant Governor Warrant patients. 80% have committed serious criminal acts of murder, rape, arson

or attempts thereat and acts of personal violence which, had they been convicted, would have resulted in terms of incarceration for many years or life. They constitute a most dangerous collection of individuals, not only because of their criminal acts but because at the time they were insane. As patients, they are entitled to all reasonable medical treatment and while they are being treated, society is entitled to be protected from their illness. Their treatment and rehabilitation is a constant challenge to the psychiatric facility to which they are attached. The prospects of recovery vary with the patient and his illness. Some may never recover. Others recover at varying rates and some regress. It is an awesome responsibility that devolves upon the Lieutenant Governor. He must protect the public from the patient's madness while at the same time providing humane treatment and reasonable psychiatric care. This responsibility cannot be delegated. In Ontario it remains at all times with the Lieutenant Governor.

What Happens to an Accused Found Not Guilty by Reason of Insanity?

The Criminal Code provides:

"545. (1) Where an accused who is, pursuant to this Part, found to be insane, the Lieutenant Governor of the province in which he is detained may make an order

(a) for the safe custody of the accused in a place and manner directed by him, or

(b) if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribes."

While it is unknown in Ontario for the Lieutenant Governor to discharge an accused absolutely under Section 545(1) (b) it is theoretically possible. It is also possible for the Lieutenant Governor to discharge the accused subject to conditions. This has been done rarely. The usual order is that the accused be safely kept in one of Ontario's psychiatric facilities until further order. There he will be treated for his mental illness and the Administrator of the facility will propound a programme for his treatment and rehabilitation.

The Ontario Facilities for the Care of the Lieutenant Governor's Warrant Patients.

The facilities are:

(a) The Oak Ridge Division of the Penetanguishene Mental Health Centre, Penetanguishene. This is a maximum security facility operated by the Ontario Ministry of Health. At the Penetanguishene Mental Health Centre there is also a regional hospital.

(b) Ten regional psychiatric facilities across Ontario operated by the Ministry of Health, of which three have medium secure units. All are coeducational.

(c) Psychiatric facilities of several public hospitals.

Every patient is either detained in or identified with one of the psychiatric facilities. It is essential to appreciate that the patient is being hospitalized and not penalized.

After considering all the evidence the Court has found that the patient should not be punished and sent to penitentiary, rather that since he was so mentally ill at the time of the offence that he should be detained and hospitalized in his own interest and that of society. Elsewhere in this monograph or the appendices the psychiatric hospitals will be described in detail. For the present it is sufficient to say that the patient will remain on the Warrant of the Lieutenant Governor until he has recovered from his mental illness and it is in the best interests of the public and of the patient that he be discharged by the Lieutenant Governor. By recovery it is not meant that he has recovered from the extreme state of mental illness which he suffered from at the time of the offence when he could not appreciate the nature and quality of his act or know that it was wrong. Recovery in the Lieutenant Governor Warrant system means being free from mental illness and is no longer a danger to himself or the public.

On entering an Ontario psychiatric hospital the patient is subject to a most thorough work-up of his case including a complete history, diagnosis, and prognosis. The hospitals are equipped with every diagnostic aid and modern form of treatment and therapy. In the Ontario system, many patients will start off in maximum security and graduate to medium security and from there to general psychiatric wards and finally they may be permitted to live in the community while reporting to the hospital on what is known as a loosened Warrant. Eventually some patients will have their Warrant vacated. Because of the nature of their mental illness others may require supervision indefinitely. Mental illness is a process and the rate of recovery varies with the illness and the individual. Some patients regress and must be returned to detention. The one outstanding feature of the Ontario Lieutenant Governor's Warrant system is that the Administrator of the hospital is responsible for the patient's treatment and rehabilitation. Most Warrants provide that the Administrator propound and implement a programme for the treatment and rehabilitation of the patient within terms limiting the bounds of the Administrator's discretion. This becomes important especially in regional hospitals where the patient is being readied to enter the community. Those limitations form part of the Warrant and will vary according to the state of the patient's mental illness all the way from a discretion in the Administrator to permit the patient to enter the community only with an escort, or to enter it for

employment or education or other therapeutic purposes, to living in the community on terms while reporting to the Administrator. Each Warrant is an individual order tailored to the needs of the patient and the protection of the public. The basic theme is treatment of the patient's illness and what is best in the public's interest. Every loosened Warrant of the Lieutenant Governor contains a provision that in the event the patient regresses, the Administrator may return him to a more secure setting and where necessary to maximum security at the Oak Ridge Division in Penetang, and for women to St. Thomas. Broadly speaking of the patients under Lieutenant Governor's Warrants, a third are detained in maximum security at Penetang, another third are in regional hospitals on varying terms permitting entry to the community, and the final third are in the community on appropriate terms as to reporting and as to supervision by the Administrator. It should be emphasized that regardless of where the patient is hospitalized he is at all times in a therapeutic relationship with the Administrator and his staff and is being monitored appropriately. That is why the recidivism rate of Lieutenant Governor Warrant patients is less than five per cent whereas if that same patient had been found guilty and sentenced to penitentiary the recidivism rate would be fifty to seventy per cent according to the nature of the crime. A commentary is appropriate here. An accused sentenced to penitentiary is entitled to be discharged when he has served his sentence regardless of his propensity to commit crime. A Lieutenant Governor Warrant patient is not discharged until he has recovered and the Lieutenant Governor-in-Council is satisfied that he has recovered and that it is in the best interests of the patient and society that his Warrant be vacated. The Lieutenant Governor has available a Board of Review composed of experts who have followed the patient from the very beginning, recommended his treatment and rehabilitation throughout the term of his Warrant and joined in a recommendation for vacation with the reasonable assurance that the patient is not apt to offend again.

The Role of the Administrator

It should be emphasized that at all times when under the Warrant of the Lieutenant Governor, the Administrator of the psychiatric facility with which the patient is identified has complete control over the patient. Each Warrant of the Lieutenant Governor is tailor-made for the particular patient and is adjusted regularly according to the patient's needs and the protection of the public. The Administrator is charged with safely keeping him and may be given certain discretions in permitting the patient to enter the community. The upper limits of the discretion are spelled out and to be exercised in the interests of the patient and the public. The Administrator cannot go beyond them. He may grant them all or in part. Thus, at all times, the patient is monitored and supervised by the Administrator.

Fitness to Stand Trial

Approximately five per cent of Lieutenant Governor Warrant patients have been found unfit to stand trial because of insanity. This does not include those remanded for observation in the criminal process. The Criminal Code contains wide provisions for remand of an accused for observation. It may be that the Judge will remand the accused for observation to one of the psychiatric facilities in which he will be detained if later he is found unfit to stand trial or found not guilty by reason of insanity. What happens in what is sometimes called these threshold cases is part of the court process and is not part of the Lieutenant Governor Warrant System. It may be of course that the Court will find the accused unfit to stand trial because of insanity and when it does it must remand the accused in custody to wait the pleasure of the Lieutenant Governor. Then the Lieutenant Governor will issue his Warrant directing the detention of the accused in a psychiatric facility. There he will be detained and treated until he has recovered sufficiently to stand his trial. At this stage the Lieutenant Governor has the assistance of the Board of Review which examines the accused from time to time and gives its opinion as to whether the accused is fit. This can be a difficult exercise especially in the case of the severely mentally handicapped or those suffering from delusions. It will be discussed more fully in the chapter on fitness but suffice it to say that the patient's case is reviewed regularly, often several times during a year, and he is returned to Court as soon as possible to stand trial. He is presumed innocent and in his best interests and the public's interests the trial should be disposed of early. An accused person found unfit to stand trial and held under a Lieutenant Governor's Warrant is returned to trial as soon as the individuals mental health permits.

Regular Reviews

The Criminal Code provides that where the accused is found not guilty by reason of insanity or unfit to stand trial by reason of insanity, his case shall be reviewed once within the first six months after the making of the original Warrant and at least once in every twelve month period thereafter. It is also provided that the Lieutenant Governor may request the Board of Review to review the case of any patient at any time.

This brings us to the Lieutenant Governor's Board of Review.

Chapter 2

The Lieutenant Governor's Board of Review

Independence:

At the very outset it must be emphasized that the Ontario Lieutenant Governor's Board of Review is utterly independent of government and any hospital facility. In Appendix "B" will be found excerpts from the Criminal Code. It is a large Board composed of 48 members of which a retired Judge, The Honourable Edson L. Haines, Q.C. is Chairman and the Honourable Mr. Justice H. Krever is alternate Chairman. There are 27 psychiatrists, 11 barristers and solicitors and 10 lay persons. The Board conducts hearings in all the psychiatric facilities where the patients are detained or with which the patient is identified. The Board travels across Ontario sitting in Ottawa, Brockville, Kingston, Whitby, Toronto, Hamilton, London, St. Thomas, North Bay and Thunder Bay. The volume of work is so great that no single group of five could conduct all hearings. Therefore apart from the Chairman or alternate Chairman, the Board is differently constituted in every city, sometimes even in the same city where the number of cases is large. As of the end of 1983, there were over 400 cases. New cases are being added at the rate of 50 to 70 per year. In 1984, the Board will be scheduling over 500 reviews and it is sitting outside of Toronto for 35 weeks.

The Ontario Court of Appeal has enunciated the purpose and role of the Advisory Review Board in the case of Abel, 1980, 56 CCC 153 as follows:

> "The whole purpose of the establishment of an Advisory Review Board was to create an independent body, bringing to its task a considerable and varied expertise of its own, and likely to develop quickly an even greater expertise with the kind of problem assigned to it, with the hoped for result that no one would be kept indefinitely in a mental institution, half-forgotten, and with his situation unreviewed except by the staff of

the institution. It is inherent in the conception and operation of such a Board that its recommendations will virtually always be accepted."

And The Honourable Mr. Justice H. Krever has said in his Report on Confidentiality of Health Records:

> "The Advisory Review Board is intended to be, and must be a completely impartial and objective body standing between the psychiatric facility on the one hand and the patient on the other. It is the agent of society through which advice is tendered to enable a decision to be made that protects the public and, at the same time, is humane to the patient deprived of his or her liberty. A just balance is impossible if the Board is expected to be part of the treating team."

The Advisory Review Board Does Not Sit In Appeal

The Board does not sit in appeal from the verdict of the Court which found the accused not guilty by reason of insanity. Occasionally patients will want to deny that they committed the offence or say they want a new trial or question the proceedings at trial. Such matters are for the Courts and any appeal must be taken in the Courts. The Board of Review must proceed on the premise that the verdict of the Court was proper and that the patient committed the offence on which he was found not guilty by reason of insanity.

The Statutory Duties Of
The Advisory Review Board Procedures

The Criminal Code provides that "the Board shall review the case and where the person was found not guilty on account of insanity, whether, in the opinion of the Board, that person has recovered, and, if so, whether in its opinion it is in the interest of the public and of that person for the Lieutenant Governor to order that he be discharged absolutely or subject to such conditions as the Lieutenant Governor may prescribe". The Criminal Code also provides that the Board shall make "any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest".

As to fitness, the Criminal Code provides "where the person in custody was found unfit on account of insanity to stand his trial, whether, in the opinion of the Board, that person has recovered sufficiently to stand his trial."

The Review

A review commences with notification to the facility, the patient, and his lawyer. The Administrator of the facility prepares a report which covers the following items amongst others:

(a) The identity of the patient, his offence and the diagnosis.

(b) Details of the offence. This is a synopsis of the material secured by the hospital staff from the Crown Attorney, defence counsel and others.

(c) Personal history of the patient. This includes a developmental history, previous hospitalizations, criminal record and previous psychiatric treatment.

(d) The course of the patient since admission to the hospital.

(e) When the patient is in the community, a report from the Social Service Department of the hospital.

(f) The recommendations of the Hospital Administrator as to the future terms of the Warrant.

The format for the Administrator's report is to be found in Appendix "C". It is designed to reveal all relevant information together with the Administrator's recommendation to the Board as to the future terms of the Warrant. In it the patient's lawyer learns of the case he has to meet. Having regard to the exigencies of the case, Administrators may make their reports to the Board available to Counsel for the patient or his medical advisor prior to the hearing. In any event, the practice of the Board is to make it available to the patient's Counsel at the hearing with appropriate directions as to disclosure described below.

Later in this monograph will be discussed the production of the clinical history and the medical reports from the files of the Board. Suffice it to say, that if Counsel for the patient or his medical advisors desire to inform themselves they will have a wealth of information on which to make meaningful submissions to the Board as to whether the patient has recovered and what is in the best interests of the patient and society.

It is important to know that before the hearing commences the members of the Board have had access to the (a) clinical record; (b) the Orders, reports and psychiatric evidence in the Board files since the inception of the case and (c) the report of the Administrator. It is equally important to know that Counsel for the patient has had similar access, subject only to the direction of the Chairman as to non-disclosure to the patient himself of matters not in the patient's best interests or that might place third parties at risk. Subject to this, the Board and the patient's Counsel have the same information.

The Hearing

At the hearing, a court reporter is present. The patient, his Counsel and witnesses are invited to come into the room and make themselves comfortable. Suitable introductions are made. Where possible, a friendly atmosphere is created. The Chairman carefully explains that the Board is independent of the hospital and is directed to consider the case of the patient and report to the Lieutenant Governor its recommendations as to the terms of

the Warrant for the ensuing year, that it is not a trial and that the Board is just as interested in the patient's recovery as the patient and his family. The patient is advised that he will be invited to make any submissions he deems appropriate and that they will be carefully considered. Next the various orders of the Lieutenant Governor are read. The patient agrees they are correct or questions them. The details of the offence are read and the patient either amends them or agrees that they are correct. Now we approach the heart of the interview. It is essential to discover the patient's insight into his mental illness, as it was at the time of the offence, as it is now, and how he sees himself in the future. Does he now believe that he was insane at the time of the offence, and if so, how long before? What type of insanity? Does he believe he has recovered? If so, when? Is he on medication? What is the medication and what does it do for him? What is his view about the need for future hospitalization and medication and what is his view as to his mental illness in the future? He is asked why he killed or raped, or committed the violent act in question. (Often he may have a history of violent acts and he is asked about them.) Here the real personality of the patient is revealed. Often he blames his conduct on his parents, on drugs, on alcohol, on his companion or his environment, and refuses to accept responsibility himself. Others do show a developing sense of responsibility. He is asked for his submissions as to what he thinks the Board should recommend and is questioned about them. The patient has been living in a therapeutic community being treated not only by medical and psychiatric staff and various other therapists, but also contributing to the therapy of other patients as they have contributed to his. At the hearing, the Administrator of the hospital is present together with the doctor in charge. Since it takes place in the hospital, other staff are on call.

At the appropriate time during the hearing a psychiatric member of the Board who has examined the patient will present his report as Consultant and be examined thereon and cross-examined.

The informality of the hearing should be emphasized. All relevant matters are explored and the patient, his family, his witness and lawyers, are afforded full opportunity to express their views. The hearing is concluded and the patient is advised the Board will consider the case. The Board then goes into camera. The usual course is that when the patient no longer needs the maximum security of Penetang and has rehabilitated to the point where he may be transferred to a regional hospital, the Board recommends the transfer and the limits of the discretion to be exercised by the regional Administrator. The recommendations may vary anywhere from safely keep with no privileges to a discretion in the Administrator to permit the patient to enter the community for education and employment purposes. At the Penetanguishene Mental Health Centre, the usual question is "Has he recovered sufficiently to enable him to be moved to a less secure facility?" When the

Board sits in the regional facilities they encounter the patient who is being readied for the community or is already in the community and monitored by the Administrator of the facility. Here the considerations reflect the state of the patient's mental health and the need for protecting society. They reflect what is in the best interests of the patient and society together with the patient's state of recovery. The Board does not recommend treatment. That is the responsibility of those who have his management and care. The Board considers the case and makes its recommendation to the Lieutenant Governor. The Lieutenant Governor then makes the Order he deems appropriate.

A comment is appropriate on the factors going to the recommendation of the Board. The government directs the environment in which the patient lives and through its psychiatric facilities the treatment plan. The Board of Review must understand the pathology of the patient's mental illness. A quick glance at the diagnostic and statistical manual of mental disorders known as DSM III and published by the American Psychiatric Association will disclose the diagnostic categories. They are:

Disorders Usually First Evident in Infancy, Childhood, or Adolescence
Organic Mental Disorders
Substance Use Disorders
Schizophrenic Disorders
Paranoid Disorders
Psychotic Disorders Not Elsewhere Classified
Affective Disorders
Anxiety Disorders
Somatoform Disorders
Dissociative Disorders
Psychosexual Disorders
Factitious Disorders
Disorders of Impulse Control Not Elsewhere Classified
Adjustment Disorder
Psychological Factors Affecting Physical Condition
Personality Disorders
Codes for Conditions Not Attributable to a Mental Disorder That Are a Focus of Attention or Treatment

The first question before the Board is to ascertain the extent of the patient's recovery. It varies with the patient. He may be wearing a mask of sanity. In a controlled setting and with competent therapy, he may be making progress, but what of him in a less controlled setting? Will he cooperate? How much insight has he into his disorder? The hallmark of mental illness seems to be

the inability of the patient to appreciate his illness. It is well said that mental illness is the "total reaction of the total man to his total circumstances". The Board must now study them. But its duties go further and it must consider the patient in two other dimensions. The Board must go on to consider what is in the best interests of society and what is in the best interests of the patient. All aspects must be considered. The recommendation is a medical-legal-social one in varying degrees. The Board must discover the pathology of the patient's mental illness and what it was that caused him to develop a psychotic state in which he failed to appreciate the nature and quality of his act or know that it was wrong and having done so, go on to enquire whether he has recovered from his mental illness and what is in the best interests of the patient and society.

The Consultant — See Chapter 7

This practice is new and a separate Chapter is devoted to it.

Some General Observations

In the Egglestone case, the Chairman described in detail the Board practices and outlined a hearing as it is conducted. These practices were met with approval in the Divisional Court. They are set forth in Appendix B1 and need not be repeated here. As was said by one of the judges in the Divisional Court in respect to the Reasons "I recommend the Reasons to those judges and lawyers interested in gaining some insight into the responsibilities of the Board and its approach to the solution of the difficult problems they face in an area of extreme sensitivity".

Interpretation Of The Word "Recovered" As Used In Section 547(5)(d) Of The Criminal Code

In the case of Lingley vs. New Brunswick Board of Review 1973, 13 CCC (2D) 303. It was held that "recovered" is not to be interpreted solely within section 16 of the Criminal Code but means being free from mental illness, deficiency or psychopathic disorder and as a result being no longer a danger to himself or to the public.

Insight And Remorse

A patient's insight into his mental condition becomes an important element. Recovery embraces a knowledge of what he did and the factors which led up to the deed and the ability to exercise self-control and not do it again.

Remorse that is looked for in a Warrant patient is a feeling of deep regret and repentence for the wrong committed. It is not to be confused with sorrow

for oneself in getting caught. That is self-pity and is unlikely to deter. It is sorrow, pity and compassion for the past victim resulting in empathy for future victims that deters.

From a clinical point of view the main issue is that of insight since the sense of remorse tends to follow the development of insight and allows the patient to gain the proper emotional appreciation of the significance of his offence.

True insight and true remorse are looked for in patients when estimating the risk of future misconduct.

Chapter 3

To The Patient

This chapter has been written especially for you. The chances are 8 out of 10 that you were charged with murder, attempted murder or some act of serious personal violence. We are now engaged upon a consideration of whether you have recovered from your mental illness, what is best for you and what is best for the public.

Why you are under the Lieutenant Governor's warrant if you have been found not guilty by reason of insanity

The Court has found that you have committed the offence on which you were charged. It has also found that at the time of the offence, you were suffering from a disease of the mind to such a degree that you could not appreciate the nature and quality of the act or know that it was wrong. As a result, you were not convicted and punished; rather, you were found not guilty by reason of insanity and made a Ward of the Lieutenant Governor so that you could be treated for your mental illness and detained for the protection of the public. The Lieutenant Governor is given an unlimited discretion as to your detention. In order to be fully informed on whether you have recovered, and what is in your best interests and that of society, he has appointed an independent Board to review your case regularly and make its recommendations to him. It is called the Lieutenant Governor's Board of Review and in the other chapters of this monograph, you will find its duties and operations fully described. The following will be of assistance to you in understanding the Lieutenant Governor Warrant system.

Hospitalization, Not Punishment

You are not being punished for your offence. You are being detained, treated and if possible, rehabilitated. Do not compare the time you might have served in prison, if you had plead guilty, with the time you are under a Lieutenant Governor's Warrant. The offence you committed provided the

occasion for discovery of your mental illness and the need to protect society. That is why you are detained under a Lieutenant Governor's Warrant and why you are being treated and rehabilitated if possible. For this purpose, you are either in a Provincial Psychiatric Hospital, or if your Warrant has been loosened, you are identified with a psychiatric facility and your reintegration into the community is being monitored.

Had you been convicted instead of being found not guilty by reason of insanity, you would have been sentenced to prison and discharged at the end of your sentence, whether or not you had recovered from your mental illness. It is quite different now that you are a Ward of the Lieutenant Governor.

You will not be recommended for absolute discharge from your warrant unless you have recovered from your mental illness and if so, whether it is in the interest of the public and in your best interest. By recovered, it is meant being free from mental illness, deficiency or psychopathic disorder and as a result being no longer a danger to yourself or the public.

The Board of Review is Advisory Only

The Board of Review does not direct treatment. It does not make decisions. It makes recommendations to the Lieutenant Governor and expresses its opinion as to whether you have recovered from your mental illness and what is in the best interest of yourself and the public. The Board may also make recommendations that it considers desirable in the interests of your recovery that are not contrary to the public interest. It is the Lieutenant Governor who makes the decision as to the terms of your Warrant.

What is the Lieutenant Governor's Board of Review

It is an independent Board appointed by the Lieutenant Governor to consider and report on your case within six months of the original Warrant and at least once in every twelve month period thereafter. It considers the current terms of your Order and makes its recommendations in respect of any future Order to the Lieutenant Governor. It stands between you, the government and the public, seeking out and carefully appraising all relevant information and then it gives its considered opinion to the Lieutenant Governor. Its independence is the protection of all.

How does the Board of Review go about its duties

In Chapter 2 you will find a complete description of Board proceedings and you are invited to read it.

A hearing will be conducted of which you will receive ample notice. A hearing is not a trial. It is a conference in which you and your advisors may participate. You may call witnesses and make submissions.

You are entitled to have a lawyer represent you, and if you do, he will be most welcome. If you do not have the necessary funds to employ a lawyer,

you are entitled to legal aid. The Administrator will assist you in making application for legal aid. It is wise to do so promptly so that your case can proceed at the appointed time and place. If you appoint a lawyer, it should be on the understanding that if he cannot proceed at the scheduled time, that he will have a stand in to represent you. Adjournments cannot be granted for the convenience of lawyers or witnesses. The reason is obvious. A hearing embraces the collective input of many people; (a) the Administrator and his hospital staff who lay aside their other duties and appointments to be available; (b) the selection from the panel of two psychiatrists, a lawyer and a layman, all of whom take the time to study your clinical history and the Advisory Review Board records; and (c) the selection and appointment of a Consultant psychiatrist who will examine you and attend at the hearing where he will present his report and be prepared to be examined concerning it. Once the members of the Board which will hear your case have been selected, they will proceed with their preparations and have reserved the necessary time for the hearing.

The Hearing

The Board proceedings are all set forth in Chapter 2. You are invited to study them carefully. Approach the hearing with the confidence that you will be fairly heard and that the Board is just as interested in your mental health as you are. Of course, the Board must consider the rights of the public to protection. The mandate of the Board is to consider whether you are free from mental illness, deficiency or psychopathic disorder and as a result are no longer a danger to yourself or the public. The balancing of your rights against the public right to be protected is often a delicate and sensitive task permitting few errors.

At the hearing, the Board of Review will be interested in your insight and whether you have a true state of remorse. Recovery embraces a knowledge of what you did and the factors which led up to your offence and your ability to avoid breaches of the Criminal Code. Remorse is a feeling of deep regret and repentance for your offence and compassion for your victims resulting in an empathy for any future victims. True insight and remorse are looked for and it must not be confused with sorrow for yourself in getting caught. That is self pity.

Be prepared to answer questions about your therapy and medication in the hospital. Often the question arises as to your need for future medication and the monitoring of your conduct. You will be asked what you wish the Board to recommend to the Lieutenant Governor. The Board may not agree with you, but rest assured, you will be listened to carefully.

Look at yourself broadly. Since you came under the Lieutenant Governor's Warrant, you have been detained and treated in a psychiatric facility. You have engaged in extensive milieu therapy in which you and your peers have

examined each other's lives. Each has learned much about the other, and hopefully, more about himself. That great Greek philosopher Plato (428 — 348 B.C.) said "life which is unexamined is not worth living". You have been examining your life. What is your insight?

Your Regional Facility

Frequently patients desire a transfer to a Regional Hospital, especially from Penetang. Across Ontario, there are ten Regional Psychiatric Hospitals. They are in Ottawa, Brockville, Kingston, Whitby, Toronto, Hamilton, London, St. Thomas, North Bay and the Lakehead. The question often arises as to whether you should be transferred to the Regional Hospital located in the region where you resided at the time of the offence. Of course, that may be the last facility to which you may wish to be transferred, especially if you desire to break old connections and start life anew. However when you wish to be rehabilitated in your regional hospital, then be prepared to discuss the support from friends and family (naming them) and the employment opportunities. The Lieutenant Governor wants the opinion of the Board as to what your situation will be if your Warrant is loosened. Also, you must keep in mind that while being detained in a hospital, there are few opportunities to act out. Therefore, the question is how will you act when given greater freedom and allowed to enter the community. There you may be a different person. How will you respond to your friends and associates. If you have abused alcohol or drugs, how will you respond to them. Should there be a provision that you abstain absolutely from the use of alcohol and the non-medical use of drugs.

One question arises frequently when the Board is considering recommending a loosened Warrant that would give the Administrator discretion to permit you to enter the community. It is, should the Board recommend that the Administrator be given the discretion to disclose your clinical record to third persons in your own interests or in the interests of the public. You should be prepared to discuss this with the Board.

Loosened and Vacated Warrants

There are two basic types of Warrants. The first is the "safely keep" Warrant issued to the Administrator of a psychiatric facility to safely keep the patient within the facility. The Administrator propounds and implements a programme for the treatment and rehabilitation of the patient within the facility.

The other basic type is called a "loosened Warant" under which the Lieutenant Governor loosens the safely keep Warrant and gives to the Administrator of the psychiatric facility a direction to permit the patient certain privileges to enter the community. The terms of a loosened Warrant vary according to the state of recovery of the patient and his needs for therapy and supervision.

Roughly about one-third of the Lieutenant Governor Warrant patients are on safely keep Warrants and are detained in the Oak Ridge Division of the Mental Health Centre, Penetanguishene. Another one-third are detained in Regional Hospitals on Warrants giving to the Administrator a discretion to permit the patient to enter the community for a variety of purposes, all of which are set forth in the loosened Warrant. The remaining one-third are living in the community at the discretion of the Administrator on terms set forth in the loosened Warrant.

Each loosened Warrant is tailor-made and reflects the state of the patient's mental illness and his need for treatment and supervision. Often mental illness is variable and the Administrator exercises his discretion within the limits of the loosened Warrant in the interest of the patient and of the public. Thus, a patient may find himself at one time permitted to enter the community on terms and find himself at other times required to remain within the facility.

Every loosened Warrant contains a provision that the Administrator of the facility, or the Administrator of the Mental Health Centre, Penetanguishene or the Executive Director of the Mental Health Division of the Ministry of Health shall have an absolute discretion to direct that the patient be taken to and detained in the Oak Ridge Division of the Mental Health Centre, Penetanguishene. This is necessary where the patient's mental illness deteriorates. Not all patients progress on a steady course toward recovery. Some have serious relapses. That is why the patients on loosened Warrants are carefully monitored by the Administrator.

It is ultimately hoped that patients do make recovery and in their own interest and in the public interest, it is appropriate to vacate their Warrants. This is illustrated when the patient has stabilized himself in the community while reporting to the Administrator, and has been free from mental disorder deficiency or psychopathic disorder and as a result is no longer a danger to himself or to others. Then the Board recommends vacation of the Warrant.

To the credit of Lieutenant Governor Warrant patients, only a small minority ever become involved in crime again, either when they are on a loosened Warrant or their Warrants have been vacated. It is also to their credit that they recognize a sense of duty to their peers still under Lieutenant

Governor Warrants by not abusing their privileges and respecting the confidence of the Lieutenant Governor in them. Most patients can look forward to eventual vacation of their Warrants, although some may suffer from such a permanent degree of illness that the best they can hope for is a loosened Warrant in terms calculated to prevent regression.

You may expect at each hearing the terms of your current Warrant and the possibility of loosening it will be carefully explored.

What You Might Do In Preparation For Your Hearing

Remember that your hearing is not an adversarial proceeding. It is a conference in which you are invited to participate. Full disclosure is made to you, except where that disclosure may not be in your best interest or place others at risk. In that event, it will be made to your solicitor on terms that will protect you and others.

Recognize if you will that one of the disabilities of mental illness is impairment of the patient to recognize that he is mentally ill. Therefore, in preparation for your hearing you may:

1. Want to discuss your case with the Administrator or the Doctor in charge of your case, your lawyer, the patient's advocate, or anyone whom you think may be of assistance.
2. Study the report of the Administrator to the Advisory Review Board.
3. Ask your solicitor if he thinks it necessary to examine the clinical file, and if so, give him appropriate instructions.
4. Ask your solicitor if he thinks it necessary to examine the documents that are available in the Advisory Review Board files, and if so, give him the necessary instruction in writing in the form set forth in Appendix **D** and authorize him to accept the information on terms imposed as to non-disclosure to you without a further application to the Chairman. See Appendix **E**, . For your information, there are in the Board files; (1) copies of all Warrants of the Lieutenant Governor; (2) copies of the reports to the Advisory Review Board of all Administrators; and (3) psychiatric reports of all doctors filed with the Board at any time, whether by the Board psychiatrist or others.
5. Consider the diagnosis and prognosis of your mental disorder and be prepared to discuss it with the Board if you can. You are not a doctor and you are not expected to talk like one. You are the patient who is seeking to learn about your mental illness, its treatment and what you may expect in the future.
6. The hearing is to afford you the opportunity to present to the Board your submissions in regard to your case. While it is not required of you, sometimes patients write out their submissions and present them to the

Board beforehand or at the time of the review. Often, these written submissions are helpful, and they avoid the risk of you forgetting matters at the hearing. Do not hesitate because you may be afraid of spelling errors or proper grammar. Speak the truth as you see it. Truth has a strength of its own. Often lawyers will prepare a written brief. These are helpful, but like your own written submissions, they are not required.

7. At the hearing, ask relevant questions. If they are not relevant or permissible, the Chairman will rule on them.
8. Have in your own mind exactly what you will be requesting the Board to recommend and why.
9. Prepare to discuss your therapy, your medication, and what you believe has been done for you. Be prepared to discuss your belief as to your need for psychiatric treatment in the future.
10. If you have had drug or alcohol problems, be prepared to discuss them.

Fitness to Stand Trial

11. If you have been found unfit to stand trial on account on insanity, you will have been detained and treated in a psychiatric facility until you have recovered sufficiently to stand your trial. The criteria of fitness will be explained to you by the Administrator, the Patients Advocate, your lawyer and others. Briefly, it is "can you participate in a meaningful way at your trial by testifying on your own behalf competently, by instructing counsel in a rational way, and having a meaningful understanding of the proceedings?"

    It is not the practice of the Board to limit your reviews as to fitness to once in the first six months after the original Warrant and once in each twelve month period thereafter. Fitness is a question of fact. It may vary from time to time. It is the practice of the Board that as soon as it can be said you are fit, a review of your case takes place and you are returned to court if this is possible. It is the policy of the Board to see that no one detained on a fitness Warrant is detained any longer than absolutely necessary.

    It is also the practice of the Board to recommend your return to court under provisions that will be the least stressful to you.
12. In Chapter VII, you will find an outline of the role of the Consultant. He will attend on you before the hearing, examine you, study your clinical record and make a report at your hearing. To enable him to examine your clinical record, he will ask you to sign Form 14 which is the Form of Consent for Disclosure as provided by the Mental Health Act. He will appear at your hearing, make his report, and may be questioned by you and your lawyer without obligation to accept his report. It is binding on

neither you nor the Board. It is for our information only. He will retire with you when the Board goes into camera to consider your case. The role of the Consultant is to provide you with a psychiatric audit of all relevant matters and to give you and the Board his opinion on your case as he sees it without binding anyone.

Chapter 4

To the Lawyer

You are about to participate in a review of the patient's case either where he has been found not guilty by reason of insanity or unfit to stand trial because of insanity. In either event, you will wish to obtain as much information as possible concerning your client's case. A good place to start is with the report of the Administrator made to the Board.

If you will look at Appendix C, you will see the suggested format for the Administrator's report. Each Administrator follows this format and as a result, the history, offence, progress in the hospital, status of the patient and the recommendations of the Administrator are all expressed in concise form. Here you will learn of "the case you have to meet". Most Administrators will give you a copy of the report before the hearing. If not, you may choose to wait until the commencement of the hearing when the report will be in the hands of the Chairman. Then, you may apply to the Chairman who will give you the report subject to any restrictions as to disclosure to your client in the interests of your client or where it is necessary for the protection of others including the hospital staff.

Next, you may wish to examine certain portions of the Board of Review file. In the case of Egglestone, (see Appendix B1), the Chairman outlined the contents of the Board of Review file that will be made available to you. In it you will find the following:

1. Copies of all Warrants of the Lieutenant Governor.
2. The reports of the Administrators of the psychiatric hospitals made to the Board of Review at any time.
3. The recommendations of the Board of Review to the Lieutenant Governor with copies of all exhibits filed at any hearing.
4. The opinions of each psychiatric member of the Board dictated at the conclusion of previous hearings and attached to each Board of Review recommendation (note as of mid 1983, this practice is no longer fol-

lowed. In its place will be found the report of a psychiatrist acting as a Consultant to both the patient the Board. See item #5).

5. The report of any Consultant together with a transcript of his evidence.

If you wish to examine these papers, secure from your client an executed consent in the form set forth in Appendix D and sign a copy of the undertaking required of you in the form set forth in Appendix E.

Thereafter, communicate with the Executive Co-ordinator, Mrs. P.A. McRae, 700 Bay Street, 24th Floor, Toronto, Ontario M5G 1Z6, telephone no. (416) 963-1391. She will make an appointment for you to attend at the Board offices and examine the documents. Please do not ask for copies or endeavour to make copies. You may make such notes as you see fit.

A word of explanation is appropriate in respect to the Consultant's report. This is a new procedure adopted by the Board in which a psychiatrist attends at the facility and the Board offices and examines the clinical record and the Board files. Then he attends at the facility and examines the patient. He will appear at the hearing, file his report and may be examined on it and cross-examined in the discretion of the Chairman. Elsewhere in this monograph, the Consultant and his role are discussed. It is the result of extensive study and experimentation in 1983 and has been received enthusiastically. The purpose of the Consultant is to make disclosure of all relevant matters through a psychiatric member of the Board who may be examined as to his findings and professional opinion. He acts quite independently of the sitting members of the Board and is not a member of it. He reports objectively "calling it as he sees it". The opinion offered by the consultant is one more piece of additional information received by the board and patient.

You will note that since the professional members of the Board no longer examine the patient, you will have in your possession the same information as each Board member sitting on the hearing.

Examination by a Psychiatrist Selected by the Patient

This is permissable. The patient's psychiatrist, psychologist or others may appear and testify at the hearing or they may write a report which may be filed.

Written Briefs and Submissions

This is done quite frequently and if filed before the hearing, they will be read by the members of the Board. They should be filed in nine copies.

The Hearing

As to the hearing — the conduct of the review is described elsewhere in this monograph. A special word is appropriate for the lawyer. He will soon discover it is not an adversary proceeding with the usual polarization of

issues and the problems of proof. It is a conference at which the patient is afforded every opportunity to express his views and produce documents and call anyone he thinks may help. The patient and his lawyer are part of the conference. The Board is required to consider three things:-

(1) the state of recovery of the patient; (2) the best interests of the patient, and (3) the best interest of the public. The patient and his lawyer are invited to express their opinions on these matters and will be asked what they are requesting the Board to recommend to the Lieutenant Governor. Consequently there are a few matters worthy of comment at this point.

1. The Lawyer for the patient will be asked for his submissions as to whether the patient has recovered. He should be careful to distinguish between recovery and a state of remission.

2. It is not helpful to submit that, if the patient had been found guilty and sentenced, the sentence would have expired. The court punishes for guilt. When the sentence is served the accused is discharged without regard to health or propensity to commit crime. When he has been found not guilty by reason of insanity he becomes a hospital case to be treated for his mental illness. His recovery is crucial. His propensity to commit crime is of paramount importance.

3. Some patients may be engaged in law suits arising out of their detention or are seeking evidence on which to base a law suit. A Board of Review hearing must not be used as a fishing expedition for such evidence. Unless the questions raised by the patient's counsel are relevant to the review by the Board they will be disallowed.

4. The patient is entitled to a review within the first six months and each twelve months thereafter. If it appears there should be earlier reviews this may be raised at the hearing and the Chairman may direct an earlier review. Also at any time the Lieutenant Governor may request the Chairman to arrange for an additional review.

5. When a hearing pertains to fitness to stand trial, it is advisable if counsel retained to defend the accused express his views as to taking instructions to defend. In any event, counsel appearing at the hearing will be asked as to his opinion on fitness, and if he were counsel at the trial, whether he would take instructions.

Not an Adversarial Proceeding

It must be emphasized that the Ontario Lieutenant Governor's Board of Review does not follow an adversarial process. It uses the conference method. There is no onus of proof. It is a collegiate Board engaged in examining all relevant matters and arriving at an informed recommendation to the Lieutenant Governor. Because of the delicacy of its task, and the

sensitive nature of the work, it encounters quite frequently difficult problems in disclosure. What is disclosed in one case may be withheld in another. It is difficult to construct rules for the mentally ill. It is equally difficult to permit extensive cross-examination of doctors especially on matters of credibility and competence. Experience has shown that the introduction of legal stratagems impair the confidence between patient and the treating doctor. Indeed, in many cases, further treatment is impossible. The Board is faced with difficult issues and you and your client are expected to become part of the resolution.

Finally a Word as to the Materials and Information Before the Board at the Hearing

Elsewhere you have been told about the clinical record and the material in the Advisory Review Board files that may be made available to you. Please proceed on the assumption that the Advisory Review Board has had access to these materials and will consider them in coming to a recommendation. The Board approaches the hearing with all available information giving it due weight. Merely because the clinical record and the Advisory Review Board files are not made exhibits does not mean they have not been considered. You may want to examine them or you may wish to proceed on the Administrator's report and the Consultant's report which usually contains accurate summaries of the relevant material.

Chapter 5

The Patient's Advocate

The office of Patient's Advocate was created by the Ministry of Health in 1983 to assist all patients in mental hospitals in the resolution of their problems. Whether voluntary or detained against their will in a psychiatric facility, the patient is in a strange world. He may be frightened and confused. A myriad of questions run through his mind. He may misunderstand his doctors, his therapist, and those who would help him. He may question why he is there, and regardless of his needs, he may want to escape and go elsewhere. He needs all the help he can get.

That is why the Patient's Advocate has been created. It is a body of counsellors available at all times to confer with the patient and answer his questions without expense to the patient. There is an office of the Patient's Advocate in each psychiatric facility. These experienced men and women are constantly available to the patient. They are ready to spend the necessary time with the patient so that he can understand his illness, his treatment, and the prognosis. On behalf of the patient, they may confer with his doctors and the treatment staff, helping them to work together for successful treatment. In cases where the patient would like a second opinion, they show him how it can be obtained. When he needs a lawyer, they show him how to obtain Legal Aid and indicate to him available lawyers and support services. They aim to be what everyone who is ill wants, a friend who is understanding and to whom the patient can look in confidence. Those treating the patient are able to look to the Patient's Advocate to assist them when required in interpreting their services. They are a continuing channel of communication between patient and doctor and the psychiatric facility.

Some basic concepts should be understood however:

1. The Patient's Advocate does not act as the patient's lawyer. He may acquaint the patient with his legal rights, but if the patient requires a lawyer, it is up to the patient to acquire his own lawyer and instruct him.

2. The Patient's Advocate does not practice medicine or psychiatry. He may do his best to make the patient aware of his medical problem and interpret the treatment of the doctors. He may even arrange consultations between the patient and the doctor. Where second medical opinions are required, all the Patient's Advocate will do is to show the patient how he may secure a second opinion.

In brief, the Patient's Advocate does not practice law nor medicine. He is a counsellor. He avoids adversary methods and adopts a role of problem resolution by conference.

Much remains to be seen as to the success of the Patient's Advocate office. It is new. Its object is to facilitate patient-doctor understanding and make for comfortable resolution of problems in the utmost good faith.

NOTE: Recourse by the patient to the Patients Advocate is not obligatory.

Chapter 6

Patient's Access to Clinical Records

This presents some very serious questions which call for special recognition where the patient is detained in a psychiatric facility. This is well illustrated in a letter written by Dr. Ronald Stokes, Medical Director of the Mental Health Centre, Penetanguishene to the Chairman of the Advisory Review Board. I quote it in part:

"I am responding to your request for comments regarding patient access to clinical records at the Oak Ridge Division of the Mental Health Centre, Penetanguishene. I appreciate that this matter has provoked concern regarding presentation of cases before the Advisory Review Board."

"The practice of medicine including the specialty of psychiatry has been based on a conference paradigm. Consequently, information from a variety of sources is pooled, sorted, weighed and although assisting in the course of assessment and treatment, rarely is a single critical feature of the process. A clinical record may contain comments from terrorized family members, staff at other hospitals, employers, family physicians etc. The information is provided with the expectation that we shall deal with the information in a confidential manner. If we fail to do so, helpful data will cease to be available. Some jurisdictions, where provisions ensure the patient access to the clinical record, have developed a double record system with a secret record or correspondence file (not deemed part of the clinical record) that contain any third party information. Personally, I am opposed to such a procedure which I believe enhances the possibility of useful data being missed."

"It is necessary to recognize that such patients, sane or insane, constitute the most dangerous individuals in Ontario and often, hidden from our awareness, harbour resentment for an individual for many years. They have threatened staff, patients, family, judges and counsel, indeed there have been cases that have gone beyond threatening."

"There are three persons I am concerned about having access to the clinical records of Oak Ridge patients: The patient's counsel, the patient and, if incompetent the next-of-kin. The counsel often believes that whatever is learned must be communicated to the client. It has been our experience that regardless of suggestion or admonition, many counsel reveal all to their clients. With regard to the next-of-kin, some clinical records may contain information from other members of the family or the patient that could promote serious disintegration or conflict in the family unit. This of course is contrary to our goal for most patients."

"A unique problem arises on the Social Therapy Unit in the Oak Ridge Division. The very essence of the therapy programme involves considerable interaction with patient and peers. These interactions are observed and become a part of the recorded data on the clinical record. Thus patient A may have information about patient B, C, and D, on his clinical record. Those other patients merit assurance that their observations are confidential or the system would fail and we have nothing to offer this difficult group of patients."

"In summary, we are dealing with an extremely dangerous group of individuals at the Oak Ridge Division. A distinction between counsel having access to the clinical record cannot be made. The clinical record contains third party information that would not be forthcoming unless we assured confidentiality to the third party. The clinical record may contain information about other patients."

The foregoing letter delineates the problem, hence the practice of the Board of Review to restrict disclosure. It is hoped that now you can see some of the reasons for the limited disclosure to patients and to solicitors on terms.

Chapter 7

The Consultant

Psychiatric members of the hearing Board no longer examine the patient. This comes about upon consideration of the views expressed in the Eggleston case by the majority of the court. See Appendix B2. Some lawyers for patients had sought the right to question the doctors who had examined the patient, contending that such an examination possibly could disclose information and opinions that should be revealed at the hearing. Many of the Board doctors objected to such questioning since it came during the hearing when they had not made up their minds. An obligation on them to answer questions during the hearing and deliberating process was contrary to an efficient review. They contended that to ask a psychiatrist during a hearing for his diagnosis and prognosis was like asking a judge or commissioner during an inquiry "what do you think of my case at this stage?" The majority of the judges in the Divisional Court felt that some limited form of questioning in the discretion of the Chairman should be permitted. The minority judge was of the contrary view.

The Board of Review considered the implications of the Divisional Court judgment and decided on an alternative course which it believes will satisfy everyone. The alternative was to have no pre-examination of the patient by the sitting Board members and therefore place the Board members in exactly the same position as the patient and his counsel. Each would have access to the clinical record and the relevant reports and material in the Board files, along with the reports of the Administrator. In addition, there would be a third psychiatrist who would examine the same material as the sitting members of the Board and the patient's counsel, but in addition, he would examine the patient, make a report, appear at the hearing and be examined by members of the Board, the patient and his counsel, and by the Administrator of the facility, his staff and any other person with an interest which includes the Patient Advocate.

Thus, there has been adopted an addition to the Board procedure, a practice whereby a psychiatric member of the Board departs from his role as

witness-adjudicator and takes on the role of Consultant, a role well established in the medical profession. With the consent of the patient, the Consultant examines him and makes all those inquiries expected of a professional psychiatrist requested to give an informed opinion. He reports on the case as he sees it and his opinion may be tested by all interested parties. His object is to inquire into all relevant matters and make an independent disclosure of what he finds.

He will not make disclosure of his report to the Board nor the patient prior to the hearing. He will enter the hearing room at the same time as the patient and his counsel and will depart with them when the Board goes into camera. At the appropriate time, he will present his report and may be examined by the patient and his counsel and all other interested parties. He will give his diagnosis and prognosis and recommended options if any. Thus, everyone will have the same information. Neither the patient nor the Board are bound by the findings or opinions of the Consultant. They are for information only.

The introduction of the Consultant does not preclude either the patient or the Board introducing the evidence of another psychiatrist, psychologist or any other evidence deemed helpful.

The Consultant's report and his examination thereon will be transcribed and made an exhibit. Thereafter it will be forwarded to the Lieutenant Governor with the recommendations of the Board.

Chapter 8

The Sex Offender

The patient who is a sex offender and has been found not guilty by reason of insanity presents a difficult problem. Dr. Vernon L. Quinsey is one of the leading authorities in Canada on the subject of testing sex offenders and he has just produced a Paper entitled "On the Assessment of Sex Offenders at Oak Ridge". It is reproduced as Appendix H and should be read by all those engaged in estimating the risk of recidivism in sexual assaults. He says "the only dynamic variable which has been shown to differentiate sex offenders from others is the psychophysiological measurement of sexual preference as indicated by the offenders penile responses to various sexual stimuli". He discusses the predictors of recidivism in various types of sex offenders and says that "the probability of future sex offending does not decline dramatically with age, as the probability of repeating a non-sexual assault." In terms of post-release behaviour, the following variables have been associated with the Commission of New Sexual Offences:

a) sexual fantasies involving the types of activities which are of concern,
b) the failure to initiate and maintain appropriate sexual relationships with adult partners,
c) beliefs that anti-social sexual behaviour are appropriate, and
d) alcohol abuse.

The treatment programme at Oak Ridge is discussed. He comments on the drug known as provera "occasionally, provera may be an appropriate form of treatment but this is very rare within Oak Ridge. Provera is more useful in the community when the aim is to reduce the amount of inappropriate fantasy and frequency of sexual urges."

Appendix A

Characteristics of Patients on Warrants of the Lieutenant Governor of Ontario By Dr. Michael S. Phillips

For his degree of Doctor of Philosophy in criminal justice, Dr. Phillips chose as his thesis to do an original study on patients under Warrants of the Lieutenant Governor of Ontario. Supported by grants from the Department of Justice, the Ontario Ministry of Health, the Clarke Institute of Psychiatry, the Law Society of Upper Canada and the Metropolitan Forensic Service, he has produced a truly original work on the characteristics of mental patients under the Ontario Lieutenant Governor Warrant system from the inception of the system until April 1, 1982. We are indebted to him. His work constitutes a collection of resource materials, statistics and recommendations for doctor-lawyer-legislator-social worker alike and with special value to those in government engaged in the welfare of the mental patient and the protection of the public from the patient's illness. Nowhere else will such a work be found. It is invaluable.

Who is the author? He is the Administrator of Metfors Forensic Services, that great institution of the Ontario Attorney General dedicated to the assistance of the courts and citizens alike in the resolution of problems of the mentally ill who have found themselves in the criminal justice system.

What has he done? He has studied every Warrant patient in Ontario down to his cut-off date of April 1, 1982. He reviews the literature on the subject, together with the outcome of studies conducted in other countries and provides us with an excellent bibliography. Then, he launches into the very heart of the research. In his own words he says:

> "It was felt that a study of every warrant patient in Ontario would provide for a better understanding of the system. Section II seeks answers to the following questions: What crimes were committed that resulted in the warrants? Were they placed on warrants because they were "Unfit to Stand Trial" or "Not Guilty by Reason of Insanity?" What kind of criminal and

psychiatric pasts had they had? Who were the victims of the offences? In what institutions are these persons currently to be found and how tight is the supervision under which they are now kept? Before we can begin to think seriously about policy considerations regarding this particular class of patient, it is first necessary to have an up-to-date description of the entire population. This is what this study offers."

What were the charges precipitating the Warrants? They are found in the author's appendix as follows:

CHARGE	NO.	PERCENT
Murder, Noncapital	81	24.4
Murder, Attempted	65	19.6
Murder, Capital	51	15.4
Murder, Unspecified	34	10.2
Arson	16	4.8
Assault Causing Bodily Harm	11	3.3
Rape	7	2.1
Indecent Assault — Female	7	2.1
Wounding	7	2.1
Manslaughter	5	1.5
Robbery, Other	5	1.5
Indecent Assault — Male	4	1.2
Robbery, with Firearm	4	1.2
Weapons, Dangerous	4	1.2
Robbery, Other Offensive Weapons	3	.9
Break & Enter, Other	3	.9
Auto Theft	2	.9
Offensive Weapons	2	.9
Weapons, Rifle	2	.9
Disturbing the Peace	2	.9
Criminal Negligence Causing Death	2	.9
Threatening	2	.9
Other Sexual Offences	1	.3
Robbery, Unspecified	1	.3
Break & Enter, Business	1	.3
Break & Enter, House	1	.3
Theft Under $200.	1	.3
Possession of Stolen Goods	1	.3
Cheque Fraud	1	.3
Weapons, Other	1	.3
Obstruct Public Peace Officer	1	.3
Counselling	1	.3
Attempt Rape	1	.3
Attempt Robbery	1	.3
Criminal Negligence, Unspecifed	1	.3
	332	100.0

Now, let us turn to the various chapters. At times, I will quote from the author.

Chapter 1. The purpose of the study is to establish a profile of individuals held under Warrants of the Lieutenant Governor. The identification and understanding of the process and the problems dealing with the mentally ill offender. It provides a solid base from which additional studies may be undertaken and what is going on today at the Clarke Institute, Metfors, and our various psychiatric facilities where the mentally ill suspected of crime are observed and the courts are advised whether he is fit to stand trial or is dangerous or potentially dangerous on psychiatric grounds. The chapter then turns to a "definition of terms" which are the key to uniform understanding and concludes with a history of the Lieutenant Governor Warrant system in Canada giving us a much needed perspective.

Chapter II. A review of the Legal Issues. Here we find a good description of the defence of insanity and the criteria which must be met when the accused is found unfit to stand trial on account of insanity and what the Lieutenant Governor must do in respect of them. Then follows a good working description of the duties of the Ontario Advisory Review Board established in 1967, its rights and obligations and a thorough analysis of the problems raised in recent litigation. In the author's view "recovery" is a matter of Advisory Review Board discretion as it endeavours to balance the rights of the accused against the demands of the public for protection. He comments on the "conference method" used by the Advisory Review Board and the tendency to use adversarial concepts in its place with an emphasis on rights at the expense of therapy. He gives a good picture of the process in a state of transition.

Chapter III. Clinical and Policy Issues in the Treatment of Mentally disordered Offenders. The right to treatment and the right to refuse treatment are examined. The interposition of the lawyer between psychiatrist and patient can be very destructive. Is the use of force legitimate in treating patients for illness which they do not recognize in settings where they will be incarcerated until they change? What of the untreatable psychopath-consent to treatment-informed consent? The Charter of Rights may result in our courts becoming the forum for the resolution of serious policy questions surrounding the treatment of mentally disordered offenders.

Chapter IV. Issues of Dangerousness. A person is not discharged from a Warrant of the Lieutenant Governor until he is found to be recovered from his mental illness and no longer dangerous to himself or the public. Neither mental illness nor dangerousness admit a precise definitions. Fundamentally, society and its political leaders that govern it will not tolerate being victims of someone else's disease who has already escaped punishment for a crime by being found not guilty by reason of insanity. The Lieutenant

Governor's Advisory Review Board is charged with the difficult and awesome responsibility. Fortunately, it is a 5-member collegiate Board composed of judges, psychiatrists, lawyers and lay persons. Each member has equal status and each contributes to the resolution which must be on a four-fifths majority. Contrary to popular belief, the considerations of the Board are not dominated by the psychiatric viewpoint. The issue before it is a medical-legal-social one and with an experienced tribunal, it is not too difficult to come to a reasonable recommendation. It is here that Mr. Phillips makes his best contribution as he recounts for us those considerations which come before each Board.

The author's views may be stated briefly:

1. "The severity of the offence. Was it premeditated? Were there sadistic components? What is the patient's insight?"
2. The diagnosis of the mental illness.

   "— diagnosis is only one factor to be considered in predicting recidivism among many variables such as age, criminal history, previous hospitalization, and sociological characteristics."

   "In the final analysis, it may be better to analyze mental illness not as an independent factor in dangerousness, but as an element to be considered in the preparation of the patient for life in the community."
3. "Statistical information while of value in predicting recidivism for a given population is of a limited value in predicting individual behaviour."
4. "Medication — is the patient adequately controlled on medication? Can the Board be reasonably assured that the medication will be continued to be taken? What are the assurances?"
5. How can a programme tailored to the needs of the individual reduce the discharge risk?

   "The question is ultimately one of choice, for increased provision of after-care services to released mental patients would likely mitigate the risk of re-offending or rehospitalization."

   "Ignoring environmental factors will clearly undermine the accuracy of the prediction of dangerousness, for we must know something about the environment in which the individual is functioning if we are able to understand and predict the individual's aggressive behaviour. This oversight is one of the problems with prediction based on in-hospital behaviour, for the hospital is an artificially structured environment, very different from the one in which the individual will live upon his release."

6. "Is the patient treatable?"
7. "Some of the key factors in predicting violent behaviour are an age of less than 30 years, previous penal incarceration, the violence of the current offence, the fact that the patient was not cohabiting and a high consumption of alcohol."
8. "Anti-social behaviour and mentally ill behaviour apparently co-exist, paritcularly for a young, unmarried, unskilled, poor male."
9. "Socio-economic factors deserve far more attention in probing the causes of recidivism. Of equal importance is the provision of adequate aftercare services, particularly in the field of employment."
10. "Part of the problem in predicting an individual's future success in the community is the absence of material information about his post-release environment."
11. "Fundamentally, society and the political leaders that govern it will not tolerate being the victims of someone else's disease. Until such time as predictions can be made more accurately, and social attitudes toward forensic patients become more tolerant, we will continue to experience society's reaction to events involving such mentally ill offenders as Emerson Bonner in Canada and John Hinckley Jr. in the United States."
12. "The results show that 96.4% of patients on Warrants were found not guilty by reason of insanity and only 5.4% were found unfit to stand trial. Over 75% of the cases were tried by a jury. Almost 31% of the population is presently at the all male maximum security at the Penetanguishene Mental Health Centre, Oak Ridge Division. Both the St. Thomas Psychiatric Hospital (with 12.7% of the population and the Brockville Psychiatric Hospital (with 10.9% of the population) have maximum security units for females, although these hospitals have both males and females on medium and minimum security units as well. It is noteworthy that 5 patients (1.5%) are presently serving time in a penitentiary having been convicted for crimes committed while on the warrant or before it.
13. "The present Warrant Status of the WLG population shows that, while 64.4% are listed as having some sort of "loosened" status, 42.8% either cannot leave the hospital at all, or must return to the hospital each night. When combined with the 34.9% who are on "full" warrants (i.e. on a maximum security unit), it leaves only 21.7% with present warrant status lax enough to permit them to live in the community. Over half the population have been at their present location from 1–5 years with 16.9% at their present location for 5–10 years. Over one-third of the

population have been on a warrant for 3–5 years and only 3.0% have been on a warrant for over 10 years."

14. "Less than 10% of the LGW population is female and 62.3% were between the ages of 18–35 years when put on a warrant. Eighteen of the patients (5.4%) were under 18 years old at the time of the warrant, and 6 (1.8%) were over 65. Almost 22% of the population had not completed any formal education and 50.9% had completed secondary school, while another 30.0% started, but did not finish secondary school."
15. Intelligent estimate of patients on LGW.

INTELLIGENCE ESTIMATE	NO.	PERCENT
Mild retardation	27	9.0
Dull normal	58	19.3
Average	145	48.2
Bright normal	45	15.0
Borderline superior	10	3.3
Superior	16	5.3
missing	31	—
	332	100.0

16. "The majority of offences precipitating the warrant were for person offences, especially murder and attempted murder. Almost all crimes for females were for person offences and a full 85% were for murder and attempted murder. While the majority of offences for males were also for person offences (murder and attempted murder — 69.6%), males also had charges of theft (8%), sexual offences (6.7%), and arson (5%). Females were more likely than males to commit the offence in their own home (63.3% vs. 38.1% respectively), although both females and males were equally likely to commit the offence in the victim's home. These results may be partially due to the fact that females are most likely to victimize their own children (40.6%) and are likely to share the same home. Strangers are most often the victims of offences by males (34.2%) which may account for 41.2% of the offences committed in non-residential buildings, parking lots and other locations. Acquaintances are the victims of both females and males to much the same extent as are spouse or boyfriends/girlfriends. Over 87% of females and 76% of males had a previous psychiatric disturbance. These figures include both inpatient and outpatient experience."
17. Suicide — one-third of patients had previous suicide attempts.
18. "The needs of the mentally retarded are not for intensive psychotherapy or chemotherapy, but habilitation for daily living."

19. "The important question is whether the "Unfit" mentally retarded, should be sent to treatment facilities when their infirmity cannot be treated and there is no chance of "recovery"."

20. "A sizeable percentage of the LGW population, 74% females and 63% males had previous psychiatric inpatient treatment prior to the offence that led to the issuance of the warrant. Related to prior hospitalization is recorded evidence of 34% of the population attempting suicide at least once."

21. "The use of alcohol and substance abuse, was fairly high with the population under study. Some 48% of males had a history of alcohol abuse prior to the offence, with 30% of the males under the influence of alcohol at the time of the offence. Drug abuse was substantially lower."

22. The LGW system and serious offences.
"The analysis of the charges has yielded some significant results. It has been argued, by the Provincial Advisory Review Board that the LGW system is retained for serious indictable offences. On the other hand some detractors of the system have tended to perceive it as being used to get troublesome individuals off the streets on minor charges. Some 83% of the population were on charges for offences against the person. Of these, 71% were on charges of murder and attempted murder; broken down 51% and 20% respectively. Property charges constituted 7%, with weapons 3%, arson 5%, and others 3%. Of the population, 2% were on summary conviction charges. The above results point to the reservation of the LGW system, at least in Ontario, for serious offences against the person. The 7 patients, 2% on minor charges may represent a subgroup within the larger group of "Unfit to Stand Trial" (5%) of our population."

23. "The analysis of the victim variable indicates that the largest single group of victims are to be found in the family."
"The socio-economic condition of our population would indicate a group that is under-endowed both economically, and educationally, and this would inevitably lead to stress, family and relationship pathologies."

24. "It could be noted then, that the important distinction that should be made with the Unfit LGW's is the focus on getting them Fit and returned to court as soon as possible."

25. "We would like to summarize the major findings of this section by describing the characteristics of patients likely to be found on warrants of the Lieutenant Governor of Ontario. He is most likely to be on a warrant as a result of being found "Not Guilty by Reason of Insanity" and would at some point be a patient at the maximum security facility in

Penetang. He would likely be on a full warrant i.e. restricted liberty prior to a loosened warrant and ultimately having his warrant vacated. He is likely to be male and be around age 26–35. His educational level may not exceed grade 8 and he is either unskilled or semi-skilled. It is likely that he is unemployed at the time of the incident leading up to his warrant and either single or separated. The offence against the person is usually murder and attempted murder and if it is a female it would likely be the murder or attempted murder of a child or children. The offense leading to warrant would likely be associated with the use of alcohol, but not drugs and the victim would be known to him. He is likely to have previous inpatient or outpatient psychiatric illness in the family. It is most likely that the warrant patient would be admitted with a diagnosis of schizophrenia and retain the same diagnosis for the duration of his warrant stay. If he had a previous warant it would likely be as Unfit and his second warrant would be NGRI after being returned to court. He would gradually be released and living in the community prior to having his warrant vacated."

26. Chapter VII compares patients on full with patients on loosened warrants.

27. Chapter VIII deals with young persons detained under the LGW.

28. Chapter IX deals with the Lieutenant Governor's warrant and the young offender.

29. Chapter X — some implications of the findings for policy planning. This concluding chapter is directed to those interested in improving the LGW system. The author points to some essential adjustments necessary for our evolving needs. They merit full and thoughtful study. One deserves a special mention. Speaking of the accused found unfit to stand trial because of insanity, he says:

    "From a legal policy viewpoint, it would be appropriate for the court to direct the lawyer representing the 'Unfit' accused to remain on the case after a finding of unfitness "as a next friend", to make arrangements for examinations, to report to the court from time to time, and to arrange for the patient's immediate appearance in court as soon as he has recovered."

The plight of an accused charged with a criminal offence is in marked contrast with his plight when involved in a civil matter. Civily he cannot sue unless he does so by a next friend and he may defend by his guardian. Thus, he is carefully protected by the courts. but when he is charged criminally, no such protection is afforded him. Ever so important is when he has been found unfit because of insanity to stand trial. A judge finding him unfit may wish to

make the widest order possible under section 543(3) of the Criminal Code and direct the counsel appearing for the accused to remain on the case until he has returned to court.

REVIEW OF DR. PHILLIPS PAPER BY EDSON L. HAINES

Appendix B1

The Advisory Review Board

In the Matter of
Vance Egglestone, Patient

And in the Matter of
the Criminal Code of Canada,
R.S.C., 1970, c.C-34

And in the Matter of
the Mental Health Act,
R.S.O., 1980, c 262
and Regulation 609, R.R.O.

And in the Matter of
the Mental Hospitals Act,
R.S.O., 1980, C 263
and Regulation 611, R.R.O.
1980

And in the Matter of
the Public Hospitals Act,
R.S.O. 1980, c 140
and Regulation 865, R.R.O.
1980

Between:

Vance Egglestone

Applicant

– and –

The Advisory Review Board,

Respondent

This is an application for access to and the right to copy certain documents and to obtain certain information in the current review and forthcoming hearing of Vance Eggleston, a patient detained under a Warrant of the Lieutenant Governor having been found not guilty by reason of insanity on a charge of rape. The Warrant of the Lieutenant Goveror was issued on the thirteenth day of February 1976. Ever since that date the patient's case has been considered and hearings have been held yearly as provided by the Mental Health Act and the Advisory Reivew Board has made its recommendations on each occasion to the Lieutenant Governor in Council. The patient's 1982 review is now in process and as part of that review a hearing has been scheduled. Through his Counsel the patient now raises several questions relating to the practice and procedures to be followed by the Advisory Reivew Board that are of interest and application not only to this case but to all other cases pending before the Board. There are currently approximately 375 such cases and Counsel quite frankly states that the same issues will be raised in other cases in which he and other fellow members of the Penetang-Midland Bar have pending before the Board this fall; that while having been raised previously they are now being pressed because of the implications of the Charter of Rights. The issues raised in this case are of the utmost importance not only to the Applicant but to every patient who comes before the Board.

The advisory Review Board has been functioning since 1969 and I have been its Chairman since 1972. Within the last ten years the patient population has increased more than three fold. Originally patients rarely retained lawyers. Since the advent of legal aid, legal representation has increased to more than 80%, and as may be expected, many new issues have arisen. It is now appropriate that the practice of the Advisory Review Board be examined and restated.

For a better understanding of the issues I propose to first outline the overall concepts and practices of the Ontario Lieutenant Governor's Advisory Review Board. Then I will deal with the specific issues raised by the Applicant.

An Overview

At the outset a clear distinction must be made between the Lieutenant Governor's Advisory Review Board and Regional Review Boards. Each is appointed under the Mental Health Act and some of the provisions of the Mental Health Act apply to both, and because of that there is apt to be confusion.

The Regional Review Boards deal with civil commitments. They are an agency for the resolution of problems arising out of the institutionalization of the mentally disordered and the management of their estates.

The Lieutenant Governor's Advisory Review Board deals solely with those held under the Criminal Code by reason of a Warrant of the Lieutenant Governor because they have been found not guilty by reason of insanity by the courts or unfit to stand trial by reason of insanity.

The large part of the cases coming before the Advisory Review Board are those where the accused has been found not guilty by reason of insanity. For the most part, they are those who have been charged with murder, manslaughter and other serious crimes. The common denominators are usually that (1) the offence constituted an act of violence against the victim, and (2) it provided the occasion for discovering that the offender was suffering from a serious mental disorder requiring treatment. Here it may be well to pause and emphasize the nature of the mental illness that permits a finding of not guilty by reason of insanity. It is not every mental disorder that permits a defence of insanity, indeed it is only the rare case where mental disorder constitutes a defence. Our Criminal Code provides that only in those cases where because of disease of the mind, the accused "fails to appreciate the nature and quality of his act or knows that it is wrong" that he may raise the defence successfully. Only when the court is satisfied that the accused comes within this special class of mental disorder does he escape a finding of guilt.

In minor offences triable only summarily, the trial judge acquits the accused and discharges him. In serious offences charged indictably, on a finding of not guilty by reason of insanity the trial judge must make an order directing that the accused be detained pending the pleasure of the Lieutenant Governor. The accused loses his freedom and becomes a lifetime ward of the Lieutenant Governor who orders his detention in such place and manner as he deems appropriate. The accused becomes a patient in one of Ontario's psychiatric facilities and is treated for his mental illness. How long he remains a ward depends on the nature of his mental illness, his recovery, and the need for monitoring his conduct. It varies with the patient and may extend throughout his life or it may be vacated. He is not forgotten. The Lieutenant Governor has appointed an Advisory Review Board to review the case of each patient regularly and to report to him in Council which is the

Cabinet. In Ontario, it is the Minister of Health who presents the Advisory Review Board's recommendations to Cabinet. The report is advisory only and it may be accepted or varied by Cabinet. The Cabinet then makes its recommendations to the Lieutenant Governor who considered them and makes his order. It will be seen that it is the government of the province taking action. The concept of an Advisory Reivew Board is in keeping with modern thinking of political responsibility. In the excercise of its powers of release of someone acquitted of crime on the ground of insanity, the Executive has the advice of a body of its citizens composed of judges, doctors, lawyers and laypersons. Its strength and the public confidence in the Advisory Review Board is found in its composition and its power to make a sound recommendation to the government. Our citizens do not take kindly to violent men escaping punishment by reason of insanity and thereafter being released unless they know they have recovered and are no more apt to offend than the ordinary person. They expect the offender will be treated fairly. This is well illustrated in the experiences of judges who try these cases. Before a jury will return a verdict of not guilty by reason of insanity, they want to know what is going to be done with the accused. They are told that the accused will not go free but that he will be kept in an institution for the criminally insane under the Order of the Lieutenant Governor and not released until he is recovered. And when judges recommend that verdict to a jury, they too firmly believe just what they say. Many of them in our province have visited our institutions and are aware of the role of the Advisory Review Board.

The consequences of a verdict of insanity are part of our criminal law. The court finds that the accused should be hospitalized rather than penalized. That is what the verdict of not guilty by reason of insanity is all about.

The Advisory Review Board is an independent and impartial investigatory body which studies the offender (who has now become a patient) commencing within the first six months of the verdict, (and each year thereafter—and more often as required). It also reports on the recovery of the patient and what is in the best interests of society and the patient. The members of the Advisory Review Board are selected because of their experience and sound judgement. Wisely the Legislature has left it to the Board to go about its work in the way it decides is most appropriate. It is vested with the power to discover the facts and the discretion to use it. The management of the criminally insane challenges the resources, ingenuity and patience of everyone associated with their care and rehabilitation. Each case is afforded individual attention, and each recommendation of the Advisory Review Board must be tailor-made for the patient with a wide margin for contingencies.

Composition of the Ontario Advisory Review Board and its Operation:

Every Board is composed of a Supreme Court Judge, or a retired Supreme Court Judge, as Chairman, two psychiatrists not of the facility where the patient is kept, a lawyer and a layperson. The Board sits at each psychiatric facility. The composition of each Board depends on the locality since members are chosen from the region of the facility so that we may have local input. The regions are Eastern, Northeastern, Central Ontario, Western and Northwestern. Altogether there are 42 members.

The Ontario Mental Health Act directs the Advisory Review Board to "consider" the case of each patient and to conduct such inquiry as it considers necessary. This is done within the first six months after the Warrant of the Lieutenant Governor has been issued and each year thereafter. The statute also provides that the Administrator of the psychiatric facility is to furnish the Chairman with such information and reports as the Chairman requests, and further that the Board or any member thereof may interview a patient or other person in private. A hearing is not necessary, but if one is held, the patient may attend unless otherwise directed by the Chairman. And where he does not attend, he may have a person appear as his representative. At a hearing, the patient or his representative may call witnesses, make submissions, and with the permission of the Chairman, may cross-examine witnesses.

While a review is always necessary a hearing is not; however, it is the practice in Ontario to hold hearings in all cases. The purpose of the hearing is to afford the patient and others, the opportunity to make submissions. The Board wants to see and hear the patient and any one who may assist the Board. It is not intended to be a trial or adversary proceeding. Seldom does the Board have Counsel at the hearing. The Board is engaged in considering the case of the patient and desires to make the patient and his lawyer part of the solution. Virtually every patient is represented by Counsel.

A review commences with notification to the facility, the patient, and his lawyer. The two psychiatric members of the Board attend at the facility and examine the patient, review his entire file and make all necessary inquiries. The administrator of the facility prepares a report which covers the following items, amongst others:

1. The identity of the patient, his offence and the diagnosis.
2. Details of the offence. This is a synopsis of the material secured by the hospital staff from the Crown Attorney, defence counsel and others.
3. Personal history of the patient. This includes previous hospitalizations, his criminal record and previous psychiatric treatment.
4. The course of the patient since admission to the hospital.

5. When the patient is in the community, a report from the Social Service Department of the hospital.
6. The recommendations of the Hospital Administrator as to the future terms of the Warrant.

At the hearing, a court reporter is present. The patient, his counsel and witnesses are invited to come into the room and make themselves comfortable. Suitable introductions are made. Where possible, a friendly atmosphere is created. The Chairman carefully explains that the Board is independent of the hospital and is directed to consider the case of the patient and report to the Lieutenant Governor its recommendations as to the terms of the Warrant for the ensuing year: that it is not a trial: that the Board is just as interested in the patient's recovery as the patient and his family. The patient is invited to make any submissions he deems appropriate. They will be carefully considered. Next the various orders of the Lieutenant Governor are read. The patient agrees that they are correct or questions them. The details of the offence are read and the patient either amends them or agrees that they are correct. Now we approach the heart of the interview. It is essential to discover the patient's insight into his mental illness, as it was at the time of the offence, as it is now, and how he sees himself in the future. Does he now believe that he was insane at the time of the offence, and if so, how long before? What type of insanity? Does he believe he has recovered? If so, when? Is he on medication? What is the medication and what does it do for him? What is his view about the need for future hospitalization and medication? His view as to his mental illness in the future? He is asked why he killed or raped, or committed the violent act in question. (Often he may have a history of violent acts and he is asked about them.) Here the real personality of the patient is revealed. Often he blames his conduct on his parents, on drugs, on alcohol, on his companion, his environment, and refuses to accept responsibility himself. Others do show a developing sense of responsibility. He is asked for his submissions as to what he thinks the Board should recommend and is questioned about them. It must be remembered that the consideration of the case was started with psychiatric examinations by the Board's psychiatrists days beforehand. They have reviewed the hospital files and consulted the staff. The patient has been living in a therapeutic community being treated not only by medical and psychiatric staff and various other therapists, but also contributing to the therapy of other patients as they have contributed to his. At the hearing, the Administrator of the hospital is present together with the doctor in charge. Since it takes place in the hospital, other staff are on call.

The informality of the hearing should be emphasized. All relevant matters are explored and the patient, his family, his witnesses and lawyers, are afforded full opportunity to express their views. The hearing is concluded

and the patient is advised the Board will consider the case. The Board then goes into camera. Four members of the five must agree. The usual course is that when the patient no longer needs the maximum security of Penetang and has rehabilitated to the point where he may be transferred to a Regional Hospital, the Board recommends the transfer and the limits of the discretion to be exercised by the Regional Administrator. The recommendations may vary anywhere from safely keep with no privileges to a discretion in the Administrator to permit the patient to enter the community for education and employment purposes. At Penetanguishene Mental Health Centre, the usual question is "Has he recovered sufficiently to enable him to be moved to a less secure facility?". When the Board sits in the Regional Facilities they encounter the patient who is being readied for the community or is already in the community and monitored by the Administrator of the facility. Here the considerations reflect the state of the patient's mental health and the need for protecting society. They reflect what is in the best interests of the patient and society together with the patient's state of recovery. The Board does not recommend treatment. That is the responsibility of those who have his management and care. The Board considers the case and makes recommendation to the Lieutenant Governor in Council. The Lieutenant Governor in Council makes the Order deemed appropriate.

A comment is appropriate on the factors going to the recommendation of the Board. The government directs the environment in which he lives through its psychiatric facilities the treatment plan. The Advisory Review Board must understand the pathology of the patient's mental illness. A quick glance at the "Manual for the Classification of Mental Disorders" published by the Health Division of Statistics Canada discloses the various mental illnesses and their complexities. There are more than thirty classes and over 200 sub-classifications. The first question before the Board is to ascertain the extent of the patient's recovery. It varies with the patient. He may be wearing a mask of sanity. In a controlled setting and with competent therapy, he may be making progress, but what of him in a less controlled setting? Will he cooperate? How much insight has he into his disorder? The hallmark of mental illness seems to be the inability of the patient to appreciate his illness. It is well said that mental illness is the "total reaction of the total man to his total circumstances". The Advisory Review Board must now study them. But its duties go further and it must consider the patient in two other dimensions. The Board must go on to consider what is in the best interests of society and what is in the best interests of the patient. All aspects must be considered. The recommendation is a medical-legal-social one in varying degrees. The Advisory Review Board must discover the pathology of the patient's mental illness and what it was that caused him to develop a psychotic state in which he failed to appreciate the nature and quality of his act or know that it was wrong and having done so, go on to enquire whether

he has recovered from his mental illness and what is in the best interests of the patient and society.

Within thirty days the Advisory Review Board makes its written recommendations to the Lieutenant Governor in Council through the Minister of Health. The Minister studies them and presents them to Cabinet. There they are studied and accepted or varied. Then the Cabinet makes its recommendations to the Lieutenant Governor who makes his Order. The patient and his lawyer are notified of the order of the Lieutenant Governor in Council.

The Ontario Facilities for The Care of Lieutenant Governor's Warrant Patients:

1. The Oak Ridge Unit of the Mental Health Centre in Penetanguishene. A maximum security facility operated by the Ontario Ministry of Health.
2. Ten Regional Psychiatric Facilities across Ontario operated by the Ministry of Health, of which three have medium secure units and are co-educational.
3. Psychiatric Facilities of several public hospitals.

Adjusting for new patients and those who have their Warrants vacated, there are approximately 375 Lieutenant Governor's Warrant patients in Ontario as of this date. The number is increasing steadily. Each patient is attached to one of the psychiatric facilities and is the personal responsibility of the Administrator of the facility. About half of the patients are under safely keep Warrants in Penetanguishene. The rest are in the Regional Hospitals under a variety of Warrants giving the Administrator a discretion as to the rehabilitation in the community within the terms of the Warrant. Most Warrants have a provision that in the event the patient regresses then in the discretion of the Regional Administrator, or the Administrator at Penetang, or in the discretion of the Director of the Mental Health Branch, Psychiatric Services of the Ministry of Health, the male patients can be returned to Penetang and the female patients to St. Thomas. It is not popular with those patients who may tend to err but it does ensure their cooperation. Therefore, the Advisory Review Board has a wide variety of facilities across Ontario to which they may recommend the transfer of patients and the terms of their detention, including the rehabilitation of the patient in the community. At all times the patient is in a therapeutic world subject to appropriate supervision and treatment according to his needs and the ability to receive it. All are in a state of rehabilitation and each looks forward to his eventual release, or at least living in the community in a controlled setting. Despite the rigid control, there is no jailhouse atmosphere. Instead, there is a common interest among most of the patients for the welfare of each other.

The Statutes

Let us now examine the statutes under which the Advisory Review Board is created and carries on its duties. They are to be found in the Mental Health Act and in the Criminal Code. They are as follows: —

The Mental Health Act, 1980. R.S.O. Chapter 262

Advisory review boards

34. (1) The Lieutenant Governor in Council may appoint an advisory review board for any one or more psychiatric facilities that has a review board.

Composition

(2) An Advisory review board shall be composed of a judge or a retired judge of the Supreme Court who shall serve as chairman, a psychiatrist and any three members who constitute a quorum of the review board.

Alternate members, etc.

(3) Subsections 30(4), (5) and (6) apply with necessary modifications to the members of an advisory review board.

Quorum

(4) The five members of an advisory review board constitute a quorum and the recommendation of a four-fifths majority is the recommendation of the advisory review board.

Functions R.S.C. 1970, c. C-34

(5) The case of every patient in a psychiatric facility who is detained under the authority of a warrant of the Lieutenant Governor under the *Criminal Code* (Canada) shall be considered by the advisory review board having jurisdiction once in every year, commencing with the year next after the year in which the warrant was issued.

Idem

(6) Notwithstanding subsection (5), the advisory review board shall consider the case of any patient to which that subsection applies at any time upon the written request of the Minister.

Application of s. 32

(7) Section 32 applies with necessary modifications to cases under this section.

Report

(8) Upon the conclusion of an inquiry, the chairman shall prepare a written report of the recommendations of the advisory review board and, within the time prescribed by the regulations, shall transmit a copy thereof to the Lieutenant Govenor in Council, and may, in his discretion transmit a copy thereof to any other person. R.S.O. 1980, c. 262, s. 34.

Inquiry and hearing

32. — (1) Upon receipt of an application by the chairman, the review board shall conduct such inquiry as it considers necessary to reach a decision and may hold a hearing, which in the discretion of the review board may be *in camera*, for the purpose of receiving oral testimony.

Attendance of patient at hearing

(2) Where a hearing is held, the patient may attend the hearing unless otherwise directed by the chairman and, where he does not attend, he may have a person appear as his representative.

Rights of patient at hearing

(3) Where a hearing is held, the patient or his representative may call witnesses and make submissions and, with the permission of the chairman, may cross-examine witnesses.

Information, reports, etc.

(4) The officer in charge shall, for the purpose of an inquiry, furnish the chairman with such information and reports as the chairman requests.

Interview may be private

(5) The review board or any member thereof may interview a patient or other person in private. R.S.O. 1980, c. 262,

The Criminal Code Section 547 reads as follows:

547. (1) The lieutenant governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2).

(2) The board referred to in subsection (1) shall consist of not less than three and not more than five members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by the lieutenant governor.

(3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which the board is appointed, and at least one member of the board shall be a member of the bar of the province.

(4) Three members of the board of review, at least one of whom is a psychiatrist described in subsection (3) and one of whom is a member of the bar of the province, constitute a quorum of the board.

(5) The board shall review the case of every person referred to in subsection (1)

(a) not later than six months after the making of the order referred to in that subsection relating to that person, and

(b) at least once in every twelve month period following the review required pursuant to paragraph *(a)* so long as the person remains in custody under the order,

and forthwith after each review the board shall report to the lieutenant governor setting out fully the results of such review and stating

(c) where the person in custody was found unfit on account of insanity to stand his trial, whether, in the opinion of the board, that person has recovered sufficiently to stand his trial,

(d) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person has recovered and, if so, whether in its opinion it is in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe,

(e) where the person in custody was removed from a prison pursuant to subsection 546(1), whether, in the opinion of the board, that person has recovered or partially recovered, or

(f) any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest.

(6) In addition to any review required to be made under subsection (5), the board shall review any case referred to in subsection (1) when requested to do so by the lieutenant governor and shall forthwith after such review report to the lieutenant governor in accordance with subsection (5). 1968–69, c. 38, s. 48; 1974–75–76, c. 93, s. 71(1)–(3).

(7) For the purposes of a review under this section, the chairman of a board has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on commissioners appointed under Part I of that Act. 1974–75–76, c. 93, s. 71(4).

The Ontario Psychiatric Hospitals, Their Facilities and Records

When conducting a review two sources of information are available to the Advisory Review Board. They are (1) the psychiatric hospital records in which the patient is detained and (2) the Advisory Review Board's own files. I will describe them so that counsel may be informed as to their contents.

The Ontario Psychiatric Hospitals

Psychiatric Hospitals may be described as having the same facilities as any general hospital, but, in addition, they are designed to concentrate on

psychiatric illness. Their overall objective is to treat the patient and provide protection to the public and the patient against the dangerous conduct of the patient. The Lieutenant Governor's Warrant patient is in a special class. The violence of his offence from which he has escaped punishment sets him aside from the group. He must be treated by all modern means so that he gains sufficient insight into his mental illness and control over his conduct that he is turned around 180° and is headed back into responsible citizenship. It may take years. It may never occur. So what is done? He enters a hospital in which he joins those suffering similar illnesses and together they join each other in their rehabilitation. Group therapy becomes the hallmark of treatment. In the errors of their peers each discovers his own shortcomings. He enters a therapeutic community in which he is encouraged to make full disclosure to his peers and staff. He lets down his barriers. As the therapy progresses he makes disclosures of intimate details in his life. In group therapy other patients make similar disclosures, all in the confidence these disclosures will not be revealed. Often on one patient's file will appear the history of other patients. These disclosures are essential to successful therapy. The records also provide ongoing information for the staff to be guided in treatment of the patient and other patients. Disclosure of the records could quickly shatter the confidentiality essential to therapy. It would disturb the doctor/patient relationship and make further treatment difficult. The interposition of the lawyer between psychiatrist and patient can be very destructive. Thus, in any given case, these sensitive areas must be approached with great care. There is the right of each patient to be protected from other patients. There is the right of the facility itself to be protected and to manage its dealings with the patient so as not to impair the policies of the institution. And always, there is the right of the public to be protected. The Administrator of a psychiatric hospital must struggle continuously to preserve the confidentiality of his records. He must avoid the consequences of unrestricted access to hospital records by those who may misuse the information. He must consider to whom he makes disclosures with the consent of the patient.

The following is an outline of what may be found in the file of a Lieutenant Governor Warrant patient in an Ontario Psychiatric Hospital.

I History of the offence. In most hospital files will be found a complete description of the offence which resulted in the finding of not guilty by reason of insanity. The hospital staff is usually at great pains to collect the Crown brief, the reports of Crown and Defence psychiatrists and the opinions of counsel and social workers. Indeed, any information that will help appreciate the nature and causes of the offence. Where relevant, other offences.

II Reports of the Administrator to the Advisory Board. Each year the Administrator reports to the Advisory Review Board. Copies of

these reports are found in the patient's file. The reports are cumulative beginning with the first admission and carrying through to the date of the report. They contain a summary of the offence and the patient's history and conclude with a report on each year's progress together with the recommendations of the Administrator and his staff. The lawyer for the patient each year will have received a copy of the report with instructions to use his discretion as to disclosure to the patient or in some cases not to make disclosure of all or part to the patient.

III Clinical records

IV Nurse's notes

V Doctor's medical examinations

VI Laboratory tests

VII Records of electro-cardiograms, electro-encephalagrams and other similar tests

VIII Psychological tests

IX Doctor's Orders, and medication records

X Phalamatric tests, i.e., inappropriate sexual arousals and the response to treatment before and after

XI Progress notes made by various people in association with the patient

XII Conference reports made by the teams looking after the patient. These reports are the considered judgement of senior staff.

XIII Notes from other departments in the facility, especially upon the patient's ability, his aptitudes and socialization

XIV General correspondence

The Files of The Lieutenant Governor's Advisory Review Board

In the Advisory Review Board files will be found:

(1) Copies of all Warrants of the Lieutenant Governor;

(2) The reports of the Administrator of the Psychiatric Hospitals to the Advisory Review Board; the first within six months of the original Warrant and yearly thereafter;

(3) The recommendations of the Advisory Review Board to the Lieutenant Governor in Council with copies of all Exhibits filed at any hearing; and

(4) The opinions of each psychiatric member of the Board dictated at the conclusion of each hearing and attached to each Advisory Review Board recommendation.

A major problem facing the Advisory Review Board is to what degree should there be disclosure of records and other information and to whom should such disclosure be made. These are some of the areas of concern:

1. Where the hospital or Board files contain information which if disclosed would impair the patient's treatment or place his doctor or therapist or staff at risk. Indeed, the conveying of some information could well result in violence. A modern psychiatric facility must keep confidential information if it is to function successfully;
2. There is information which if conveyed would be misinterpreted or misunderstood;
3. There is information divulged in confidence by its author that it would not be disclosed to the patient or anyone on his behalf. This is especially difficult when the very description of the information would identify the informant or feed the patient's paranoia; and
4. Finally, to give a mentally ill patient access to his clinical records or nurse's notes, would in some cases, be courting disaster for those who contributed to the file. Generally speaking, mental illness impairs the patient's ability to appreciate that he is mentally ill. He may believe that it is others who are mentally ill and are wrongfully causing his detention.

I will now deal with the matters raised in the Applicant's Notice of Motion and extended in his submission made on the 6th day of August, 1982.

The Hospital File

It is now before the Board. I direct that counsel for the patient and/or a duly qualified psychiatrist may examine the hospital file in the presence of a member of the Board to be designated by me on the condition that no part of the hospital file be disclosed to the patient. Examination to take place at a mutually convenient time and place. If upon examining it, counsel for the patient desires to disclose any part of it to the patient, I will entertain a further application. The file is voluminous.

The File of The Advisory Review Board

I direct that the following may be examined,

(1) copies of all Warrants of the Lieutenant Governor,

(2) the reports of the Administrator of the psychiatric hospitals to the Advisory Review Board,

(3) the recommendations of the Advisory Review Board to the Lieutenant Governor in Council with copies of all exhibits filed at any hearing,

(4) The opinions of each psychiatric member of the Board dictated at the conclusion of each hearing and attached to each Advisory Review Board recommendation.

These may be examined by the patient's psychiatrist and/or his lawyer at the offices of the Advisory Review Board, on the condition disclosure is not made to the patient without the prior consent of the Chairman.

The Right of the Patient or his Lawyer to see the Notes of Members of the Advisory Review Board

The Advisory Review Board is an independent body composed of a Supreme Court Judge as chairman, two psychiatrists not of the facility where the patient is kept, a lawyer and a layman. They are charged with the duty of reviewing the case of the patient and advising the Lieutenant Governor as to whether the patient has recovered and as to whether in its opinion it is in the interest of the public and the patient that he be discharged absolutely or subject to conditions. The review embraces both medical and public consideration. Four of the five members must agree in order to make a recommendation. The Mental Health Act provides that any member of the Advisory Review Board may interview the patient or other person in private.

The psychiatric members of the Board do not want to form an opinion on the mental health of the patient without first examining him. It makes for a much more adequate review and reduces the margin of error in ascertaining the degree of recovery, the prediction of dangerousness and the recommendation of suitable controls.

It is the practice of the psychiatric members of the Advisory Review Board to interview the patient in private so that along with the other members of the Advisory Review Board they may perform their duties. The same right of interview applies to all other members of the Board. Because there are many cases to review, its members make such notes as they deem appropriate to enable them to discuss the case during the review. These notes are in such form as the maker sees fit. They are much the same as any judge or other professional would make on reviewing a case in which he is about to participate. They may record preliminary impressions. They are an aid to the memory. They are for the use of the maker. To produce them would be unfair to both the maker and to an adequate review.

It is the view of the Chairman that the notes of any member of the Advisory Review Board should not be made available to the patient or his lawyer. They are for the assistance of the members only and are shared, amplified and amended as the review proceeds.

In paragraph (a) of his Notice of Motion, the Motion, the applicant asks for production of "any reports by the psychiatric members of the Board for

the purpose of the hearing". Depending on the author, some notes are quite extensive and may be called reports. Regardless of their description, as notes, reports, or by any other name, I have decided that any writing of a member of the Advisory Review Board prepared for the purpose of the review is not to be produced.

Cross-Examination of Board Psychiatrist During the Hearing

Now I will deal with the application as it pertains to the right to examine or cross-examine the board psychiatrist; or any other member of the board during the hearing.

The hearing is only one part of the reviewing function of the Board. The Board wants to hear from the patient and the witnesses who may be members of the hospital staff, the patient, and those who wish to help him; in fact anyone who believes he can help. The Mental Health Act, section 32(5) provides that a Board member may interview anyone in private. The Mental Health Act recognizes peculiar needs of the psychiatric patient; his need to have an opportunity to communicate in private with an individual member of the Board when the Board is conducting its inquiry; the needs of others to communicate without fear or reprisal. In this respect, the Ontario Statute is unique. The Board is seeking to discover whether the patient has recovered from his mental illness and what is in the best interests of the patient who has been found insane at the time of his offence, and in the interests of the public who wish to be assured he will not offend again as a result of his insanity. It is a collegiate board which does not want to make up its mind until it has heard all the evidence, the submissions of the patient and his counsel, and any other relevant matter. To ask a psychiatric member of the Board for his opinion before a case has concluded is like asking a Judge or Royal Commissioner his opinion during a hearing. If compelled to answer, they find themselves embarrassed in coming to a joint recommendation with the other members of the Board (the statute requires 4 out of 5 to agree). When the Board goes into camera, the members often do change their views during discussion. For 5 different reasons, they may agree on a recommendation. It would be harmful to the Board processes if 1 or 2 members expressed opinions in response to counsel's questions and then, when persuaded by the wisdom of their confereres, join in a recommendation contrary to the expressed opinion. Therefore, I rule on this application, as I have on all other hearings, that the psychiatric members of the Board may not be questioned during the hearing.

The Application to the Chairman to Compel the Administrator to Make Production of the Hospital History to the Applicant or his Counsel

I have no such power. The Mental Health Act provides that upon refusal to make the clinical record available, the applicant may apply to the Divisional

Court. Only when the Administrator produces the hospital history to the Advisory Review Board has the Chairman any power over it. The file is now before the Board and I have ruled upon it.

The Federal Inquiries Act

Counsel for the applicant submits that as Chairman, I have the powers conferred by section 547(7) of the Criminal Code which reads as follows:

> For the purposes of a review under this section, the Chairman of a Board has all the powers that are conferred by sections 4 and 5 of the Inquiries Act on Commissioners appointed under Part 1 of that Act. 1974-75-76, c.93, s.71(4).

It is with reluctance that I conclude I have not those powers or to put it another way, I'd be most reluctant to use them in the present state of the law. All other Advisory Review Boards in Canada, appointed under the Criminal Code, have those powers. It would appear only Ontario is without them. In the work of the Board, they are sorely needed. In the quest for truth, it is necessary that witnesses be compellable. It is also necessary that the witness, on being sworn, should be able to object on the grounds that his answers may tend to incriminate him and thus obtain what is popularly called the "protection of the court". A few examples will suffice. It is becoming rather frequent that psychiatrists and hospital staff of psychiatric hospitals are being sued in damages for alleged tortious acts and at times, charged with criminal offences, such as assault arising out of the discharge of their duties. A patient found unfit to stand trial, because of insanity, is asked about his alleged offence on his hearing as to fitness and he ought to be able to discuss his offence without incriminating himself. Or again, as in the present case, the doctors and staff testifying ought to be able to answer reasonable questions without fear of incriminating themselves.

I have always been of the opinion that the Ontario Lieutenant Governor's Advisory Review Board has been appointed under a provincial statute and that its powers do not extend to the use of the Federal Inquiries Act. I do not wish to issue subpoenas compelling the attendance of witnesses and the production of documents, or granting what is popularly called the "protection of the court" only to find that I am in error or worse still, the protection given witnesses is illusory. Therefore, I refuse to exercise the powers, (if I have them) under section 547(7) of the Criminal Code.

Appendix B2

Canadian Criminal Cases

**Re Egglestone and Mousseau
and Advisory Review Board**

*Ontario High Court of Justice, Divisional Court,
Griffiths, Saunders and Trainor JJ. June 24, 1983.*

Mental illness — Advisory Review Board — Applicants held at mental health centre under Lieutenant-Governor's warrants as result of verdict of not guilty by reason of insanity in criminal matters — Chairman of board refusing to permit counsel access to information submitted by hospital and to board's file unless counsel undertook not to reveal information to client — Chairman also refusing to permit counsel or patient to be present when psychiatric members of board gave their opinions — Board under duty to act fairly — Whether board in breach of duty by making such orders — Mental Health Act, R.S.O. 1980, c. 262, ss. 32, 34 — Canadian Charter of Rights and Freedoms, s. 7.

The applicants had been found not guilty by reason of insanity following a trial on criminal charges and were confined under Lieutenant-Governor's warrants in a mental health centre. The applicants sought judicial review of orders made by the chairman of the Advisory Review Board. The chairman had ordered that the hospital and board file could be produced for examination by the applicants' counsel or a duly-qualified psychiatrist on condition only that disclosure not be made to the applicants without the prior consent of the chairman of the board. The chairman had also refused to make disclosure of information obtained and opinions arrived at by the psychiatric members of the board in conducting their private examinations of each applicant prior to the hearing. The Advisory Review Board is made up of a

chairman, two psychiatrists, a barrister and a person who is neither a psychiatrist nor a lawyer. It was the practice of the board that the two psychiatrists who were members of the board conduct private interviews with the patient prior to the hearing. The patient and his counsel were entitled to be present at the hearing but were excluded when the psychiatric members of the board offered their opinions to the other board members. On application for judicial review, held, Trainor J. dissenting in part, the application should be granted in part.

The Advisory Review Board is under a duty to act fairly, but that duty was not breached by the chairman's first order concerning the availability of the hospital and board file. The chairman had a discretion to limit disclosure on the ground that such material might be harmful to the patient or others, and there is no reason for requiring that the limited disclosure order be made only where first requested by members of the hospital. The disclosure of information affects not only the relationship between the patient and the doctors involved but, as well, the records containing reports by non-medical people who have had contact with the patient. It is for the board to make the decision having regard to the interests of all parties involved as to what extent disclosure is justified and on what basis. While it may be that counsel is placed in an awkward position with his client, this was the only reasonable order that could have been made by the chairman to achieve a balance between the right of the patient to the disclosure of the relevant facts and the right and duty of the board to preserve confidentiality of information in sensitive areas. It may be that faced with such an order counsel should obtain the consent of his client to accept the documentary review on this limited basis, as otherwise he may not feel at liberty to receive the information at all.

Per Griffiths J., Saunders J. concurring: With regard to the second order concerning the psychiatric members of the board, this was in breach of the board's duty to act fairly. While there was no justification for ordering the production to the patient of notes or records kept or maintained by the board's psychiatrists, formulated from their review of the hospital records generally as well as from their interviews of the patient, the board was required as part of its duty to act fairly to disclose the substance of the facts to which it was going to apply its mind, and those facts would include the professional opinions presented by the board's psychiatrists. The board failed to meet its procedural duty of fairness to the applicants in refusing to allow them and their counsel (or possibly their counsel alone) to be present when the psychiatric members of the board presented their findings to the board based on their interviews with the applicants and their review of the medical files. At such a hearing the chairman could, in the exercise of his discretion, permit questions to be asked of the psychiatrists to clarify any statements made. Then counsel, as well as the patient or his witnesses, might

be able to respond to some of the assertions of the psychiatrists in such a way as possibly to persuade the psychiatrists to alter their positions. The chairman would of course first inquire of the psychiatric members of the board whether any portion of their reports should not be heard by the patient in the interests of avoiding harm to him or others. The chairman would then be in a position to rule as to the extent to which the patient should be present, if at all, during the hearing of the reports and the chairman might decide in the exercise of his discretion that counsel alone may be present, on an undertaking from counsel not to disclose any information so acquired to his client. If it acted in such a manner, the board would not be in breach of the principles of fundamental justice as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*.

Per Trainor J. dissenting on this point: The applicants were only entitled to know the substance of the facts, and any obligation of disclosure on the part of the psychiatric members of the board would be confined to pertinent facts of which the applicants were unaware. In this case, the record did not disclose that the findings made by the psychiatrists as a result of their private examinations of the applicants were substantially different from the facts and opinions contained in the medical and board records to which counsel had access. It could not be said that the applicants were taken by surprise or that they did not have available sufficient information to know the case they had to meet. If a situation arose where a member of the board, because of a private investigation or interview, discovered some previously unknown material fact that was not otherwise in the records available to counsel or the patient then, before acting on the information, he would be required to disclose that evidence to the patient or counsel subject to the sensitive considerations involved in dealing with psychiatric patients. The scheme of the legislation is investigative rather than adversarial, and the underpinning of medical and psychiatric opinions often cannot be disclosed because of the detrimental effect disclosure would have on the patient, the staff and the public. Barring knowledge gained by a member of the board of previously unknown and undisclosed salient facts, board members are not required to disclose tentative opinions to counsel or to the patient. This must be left to the discretion of the board and its chairman.

Re Abel et al. and Director, Penetanguishene Mental Health Centre (1979), 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304; affd 31 O.R. (2d) 520, 56 C.C.C. (2d) 153, 119 D.L.R. (3d) 101, *sub nom. Re Abel et al. and Advisory Review Board,* **consd**

Other cases referred to

Official Solicitor to the Supreme Court v. K et al., [1965] A.C. 201; *Re Pergamon Press Ltd.*, [1971] 1 Ch. 338

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 7
Mental Health Act, R.S.O. 1980, c. 262, ss 32, 34

APPLICATION for judicial review of decisions of the Advisory Review Board.

J.G. Lunnie, for applicant, Vance Egglestone.
J.L. Ronson, for applicant, Donald Mousseau.
M. Manning, Q.C., S.G. Himel and *P. Connelly,* for respondent.

GRIFFITHS J.:—The applicants are persons who have been charged with criminal offences, found not guilty by reason of insanity and confined under Lieutenant-Governor's warrants in mental health centres. They seek judicial review of decisions of the Advisory Review Board ("the Board"):

1. With respect to Egglestone, ordering his hospital (clinical) file and his Board file to be produced for examination by his counsel and/or duly qualified psychiatrist on condition only that disclosure not be made to Egglestone without the prior consent of the chairman of the Board;
2. With respect to each applicant, refusing to make disclosure of the information and opinions obtained or arrived at by the psychiatric members of the Board in conducting their private examinations of each applicant prior to the hearing.

The Board here was created by Order in Council pursuant to s. 34 of the *Mental Health Act,* R.S.O. 1980, c. 262, which authorizes the Lieutenant-Governor in Council to appoint an Advisory Review Board to be composed of a judge or retired judge of the Supreme Court who shall serve as chairman, two psychiatrists, a barrister and solicitor, and a person who is neither a psychiatrist nor a lawyer to constitute a quorum of five members.

Section 34(5) of the Act directs the Board to consider the case of each patient detained in a psychiatric facility pursuant to a warrant of the Lieutenant-Governor and to conduct such inquiry as it considers necessary to make to the Lieutenant-Governor in Council the report concerning these patients including, of course, any recommendations for his release. Such review takes place within the first six months of the issuance of the Lieutenant-Governor's warrant and on a yearly basis thereafter.

When the patient makes an application for review, s. 32 provides the procedure to be followed:

> 32(1) Upon receipt of an application by the chairman, the review board shall conduct such inquiry as it considers necessary to reach a decision and may hold a hearing, which in the discretion of the review board may by *in camera,* for the purpose of receiving oral testimony.
>
> (2) Where a hearing is held, the patient may attend the hearing unless otherwise directed by the chairman and, where he does not attend, he may have a person appear as his representative.

(3) Where a hearing is held, the patient or his representative may call witnesses and make submissions and, with the permission of the chairman, may cross-examine witnesses.

(4) The officer in charge shall, for the purpose of an inquiry, furnish the chairman with such information and reports as the chairman requests.

(5) The review board or any member thereof may interview a patient or other person in private.

Under s. 32 the Board is obliged to hold an inquiry or review but a hearing is not necessary. In fact, it has been the practice of this Board to hold hearings in all cases.

The Board initiates a review by notification to the psychiatric facility, to the patient and to his lawyer of a proposed hearing.

Pursuant to s. 32(4) of the Act, the administrator of the psychiatric facility (under the Act "the officer in charge") is required to forward the chairman of the Board such information and reports as he requests. In practice what the administrator provides is a report that generally contains, among other things, a complete history of the offence, clinical records, nurses' notes and results of psychological and other tests. The typical report will also contain progress reports made by people who have had contact with the patient, conference reports made by teams looking after the patient, notes from other departments in the facility commenting upon the patient's ability, aptitudes and socialization. The Board has also maintained its own files on each patient covering past reviews, reports of the administrators of the facilities, past recommendations of the Board to the Lieutenant-Governor in Council, and opinions previously given by psychiatric members of the Board.

Before the hearing, it is usually the practice of the Board to have its two psychiatric members attend at the facility and privately examine the patient, review his entire file and make all necessary inquiries.

The hearing is conducted in the presence of the patient and his counsel. At the outset of the hearing the patient is given a brief four or five-page summary of the background facts and clinical records prepared by the administrator of the facility. The chairman then explains that the hearing is not intended to be a trial or an adversary proceeding. Various orders of the Lieutenant-Governor are read and confirmed as accurate. The chairman then questions the patient as to the details of his offence and other pertinent matters. The patient, his family and witnesses are permitted to be heard. Counsel is invited to make submissions. The Board rarely has counsel.

The Board retires after hearing the submissions of counsel for the patient. The practice then is to hear the reports in the absence of the patient or his counsel of the two psychiatric members of the Board covering, among other things, their examination of the patient and their personal opinions. The Board then makes its decision on which four of the five members must agree.

Within 30 days, the Board makes its written recommendations to the

Lieutenant-Governor in Council through the Minister of Health. Attached to those written recommendations are transcripts of the reports given to the Board in private by the psychiatric members. The Minister then reviews the recommendations and presents them to Cabinet. Cabinet may accept or vary the recommendations. Ultimately the Lieutenant-Governor makes his order based on the recommendations of Cabinet. The patient and his lawyer are notified of the order of the Lieutenant-Governor in Council in due course.

In this case each applicant, Egglestone and Mousseau, was scheduled to have a review and hearing in 1982, of the nature I have described. Each was examined privately prior to the dates of the proposed hearings by the two psychiatric members of the Board concerned.

Prior to the hearing, counsel for Egglestone applied to the Board for an order granting access to all documents placed before the Board and compelling the administrator of the Mental Health Centre, Penetanguishene, to produce to Egglestone or his counsel, his complete clinical file and to permit them to make copies of all documents produced. Later the application was enlarged to include a request for any "reports" of the psychiatric members of the Board who had examined Egglestone.

On August 31st the chairman of the Board made the following ruling in respect of Egglestone's application:

> (a) Counsel for the Applicant or a psychiatrist may examine the hospital file in the presence of a designated member of the Board on the condition that no part of the hospital file be disclosed to the patient, and a further application may be brought if counsel for the Applicant wishes to disclose any part of the file to the Applicant;
>
> (b) Counsel for the Applicant may examine copies of the warrants of the Lieutenant Governor, the reports of the Administrator of the psychiatric hospitals to the Advisory Review Board, the recommendations of the Advisory Review Board to the Lieutenant Governor in Council, copies of all exhibits filed at any hearing and the opinions of any psychiatric member of the Board dictated at the conclusion of the hearing and attached to the Advisory Review Board recommendation on the condition that there be no disclosure to the patient without prior consent of the Chairman;
>
> (c) Neither the patient nor his counsel may be permitted to see the notes of the members of the Board;
>
> (d) The psychiatric members of the Board may not be questioned during the hearing; and
>
> (e) The Chairman of the Board has no power to compel the Administrator of the Mental Health Centre, Penetanguishene to produce the hospital history to counsel for the Applicant or the Applicant's counsel.

The chairman in his reasons for the order outlined the problems that faced the Board on the issue of disclosure of records to patients as follows:

A major problem facing the Advisory Review Board is to what degree should there be disclosure of records and other information and to whom should such disclosure be made. These are some of the areas of concern:

1. Where the hospital or Board files contain information which if disclosed would impair the patient's treatment or place his doctor or therapist or staff at risk. Indeed, the conveying of some information could well result in violence. A modern psychiatric facility must keep confidential information if it is to function successfully;
2. There is information which if conveyed would be misinterpreted or misunderstood;
3. There is information divulged in confidence by its author that it would not be disclosed to the patient or anyone on his behalf. This is especially difficult when the very description of the information would identify the informant or feed the patient's paranoia; and
4. Finally, to give a mentally ill patient access to his clinical records or nurse's notes, would in some cases, be courting disaster for those who contributed to the file. Generally speaking, mental illness impairs the patient's ability to appreciate that he is mentally ill. He may believe that it is others who are mentally ill and are wrongfully causing his detention.

On September 8, 1982, the date set for the hearing, counsel for Egglestone advised the chairman that in the light of his decision on the motion, neither counsel nor his client would participate in the hearing so as not to waive the applicant's rights to judicial review of the order. The Board then deliberated and made recommendations on September 8th that there be no change in the status of the applicant and that he remain at the mental health centre. An Order in Council was issued on November 17, 1982, accepting the recommendation.

On January 22, 1982, the Board held its hearing in the case of the applicant, Mousseau. The usual procedure on such a hearing that I have outlined earlier was followed and then counsel for the applicant was invited to make submissions.

Counsel submitted that he and his client should be allowed to be present to hear the reports on the findings of the two Board psychiatrists made as a result of their interviews of Mousseau. The chairman ruled against this request.

The Board heard the reports of the psychiatrists in private and then recommended Mousseau continue to be detained at the psychiatric facility. On February 19, 1982, the Lieutenant-Governor in Council approved and adopted the recommendations of the Board.

I

The ruling of the chairman regarding the production of hospital and Board records

The duty of the Board to disclose to the patient and his counsel information pertinent to the review was settled by the decision of *Re Abel et al. and Director, Penetanguishene Mental Health Centre* (1979), 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304 (Div. Ct.), affirmed on appeal 31 O.R. (2d) 520, 56 C.C.C. (2d) 153, 119 D.L.R. (3d) 101, *sub nom. Re Abel et al. and Advisory Review Board,* Arnup J.A., delivering the reasons of the Court of Appeal, said at pp. 533–4 O.R., pp. 167–8 C.C.C., pp. 114–5 D.L.R.:

> The Chairman of the Board refused to disclose any information because he "had no authority to do so". He *did* have authority. It was derived from the duty imposed upon him and the other members of the Board to act fairly — a duty imposed by law. His decision to refuse all disclosure was, therefore, properly quashed by the Divisional Court.
>
> What is the extent of the duty imposed on the Board to act fairly? I would echo the note of caution expressed by Southey J. at the conclusion of his reasons as to the "extremely sensitive area" in which the Board functions. I would, therefore, venture to express only certain general guidelines, because in my view, the Board, in every case in which it is asked for information, has a discretion which must be exercised having regard to the facts of that case. Furthermore, we have heard an appeal in one particular case. We are not called upon to promulgate specific rules of procedure for the Board. A means of doing that already exists.
>
> In the first place, we are dealing with a situation where lawyers have been retained to represent seven patients at a hearing to conduct the annual review of what the statute calls their "case". The Board has to decide what to do with them — to recommend that their confinement continue? that they be allowed some supervised freedom under a "loosened warrant"? that they be released forthwith or on a specified future date?
>
> The Board has to obtain the facts to which it is going to apply its mind. If lawyers are going to represent their patient-clients adequately, they need to know the substance of those facts (as Lord Denning said in *Pergamon, supra [Re Pergamon Press Ltd.,* [1971] Ch. 388], the Board "need not quote chapter and verse"). There may be good reason why some of the specific facts should not be revealed. This is for the Board to decide. The Chairman, if he requests the officer in charge to provide information for the purpose of an inquiry pursuant to s. 29(4) of the *Mental Health Act,* obviously should not "tailor" his requests to the Centre so that he will not be given what he does not want to reveal. On the other hand, what he feels the Board needs is not necessarily what he may decide should be given to the lawyers.
>
> What terms, if any, should be imposed when disclosure is made is also a matter for the Board to decide. While it may place the lawyers in an awkward situation, one can envisage cases where information might be disclosed on terms that it not be disclosed to the client.

No doubt the chairman of the Board, in making the limited order for production of the documentary material here, to the solicitor alone, on the

basis it not be disclosed to Egglestone, was complying with the decision in *Abel*. Other authorities have recognized the right of limited disclosure to the solicitors alone. For example, in *Official Solicitor to the Supreme Court v. K et al.*, [1965] A.C. 201 at p. 214, the House of Lords, concerned with an application for wardship of infant children, approved of the concept of disclosure of confidential information that might be harmful to the infant, to the legal advisers of the parties alone.

Counsel for Egglestone, while conceding that the chairman had a discretion to limited disclosure on the grounds that such evidence might be harmful to the patient or others, submitted nevertheless that the decision that certain material be restricted should initially be a medical decision made by the administrator of the facility or by the doctors involved in the care and treatment of the patient. He submitted that only where the administrator or doctors involved have first declared that the release of information contained in the records may be harmful, should the chairman consider making a restrictive disclosure ruling.

As well, counsel for Egglestone submits that the order restricting disclosure of the material to counsel alone places counsel in a very difficult position with his client. A client, it is submitted, has an absolute right to know, and the lawyer cannot ethically or properly refuse to release to his client vital information that he has obtained.

With respect to the first submission, it is my view that there is no valid reason for requiring the medical people involved to make the initial decision that the material should not be disclosed as a condition precedent to the right of the chairman and the Board to exercise its discretion on the issue of disclosure. This issue affects not only the relationship between the patient and the doctors involved, but as well, the records contain reports by non-medical people who have had contact with the patient. In the last resort, it is for the Board to make the decision, having regard to the interest of all parties involved, as to what extent disclosure is justified and on what basis.

While I am sympathetic to the fact that counsel receiving the information on the limited basis here is placed in a very awkward position so far as his client is concerned, it seems to me that this is the only reasonable order that could have been made by the chairman to achieve a balance between the right of the patient to disclosure of the relevant facts, as against the right, indeed duty, of the Board to preserve confidentiality of the information in sensitive areas.

I would expect that faced with the order made here counsel should obtain the consent of his client to accept the documentary review on this limited basis, otherwise he may not feel at liberty to receive the information at all.

The order of the chairman provided that counsel for Egglestone could apply further to the chairman for permission to release information to his client. In my view, that order left it open to counsel, at a later stage after he

had completed his review of the documents, to submit that the chairman in the exercise of his discretion, ought to order the release of some or all of the documents on the basis that it was apparent from their contents their release would cause no harm.

The application of Egglestone is therefore dismissed in so far as he seeks a declaration that the chairman erred in ordering the production of documents to the applicant's counsel on the limited basis.

The right of the applicant and his counsel to be present at the hearing when the psychiatric members of the Board present their reports to the Board concerning their interview of the applicant

This raises an issue common to both applicants. Counsel for Egglestone submits that the patient and his counsel should have as well the right to any notes or records of the Board psychiatrists made in the course of their investigation and interview of the patient and that in addition counsel should have the right to hear the "evidence" of the psychiatrists and to cross-examine the psychiatrists on the evidence as part of the hearing.

Counsel for Mousseau does not go as far. He submits that counsel and the patient should have the right to be present when the two psychiatrists make their reports to the Board, subject to the overriding discretion of the chairman to rule against the open disclosure of any sensitive material contained in those reports.

At the outset I must say that I see no justification for ordering the production to the patient of notes and records kept or maintained by the Board psychiatrists, formulated from their review of the hospital records generally as well as from their interview of the patient. To order production of these documents is not required under the concept of "fairness" to the applicants in this non-adversary process.

As well, in my view, the court has no right to order that any person involved in the hearing be subject to cross-examination. The right to cross-examine is a right specifically reserved to the discretion of the chairman by s. 32(3) of the Act. The more difficult issue is the extent to which disclosure should be made, if at all, of the psychiatric reports of the two Board psychiatrists to the patient and his counsel.

As part of the Mousseau record, we have before us the transcript of the private hearing of the Board covering the report of the two psychiatrists. In that transcript the psychiatrists detail the history taken from the patient and review his background generally. Psychiatric opinions are offered by the psychiatrists based on the history obtained and the physical examination of the patient. In each instance the psychiatrist concludes his report with a diagnosis of the mental illness of the patient and finally makes a recommendation that the patient continue to be institutionalized. The views of the psychiatrists because of their expertise would obviously have a substantial if

not dominant impact on the decision of the Board. Indeed, their analysis based on the interview and the review of the medical file may, in most cases, be a determining factor in the Board's ultimate recommendation. Here, following the reports of the psychiatrists, the Board arrived at a decision which, in effect, adopted the recommendation of the two psychiatrists.

Counsel for the respondent submits that under the provisions of s. 32(5) of the Act the Board or any member thereof may interview a patient or any other person in private. Thus, where the psychiatric members of the Board conduct an authorized interview of the patient, they do so as members of the Board, and not as witnesses to the hearing. Accordingly, it is submitted the Board members should not be required to disclose to the patient and his counsel information which they have obtained in a manner sanctioned by the statute and as part of the fact-gathering process.

The decision of the Court of Appeal in *Abel, supra,* stands for the proposition that a duty is imposed by law on the Board to act "fairly". That duty requires the Board to give to the patient and his counsel not chapter and verse but the substance of the facts "to which it is going to apply its mind". The court recognized that the duty to disclose is subject to the overriding discretion of the chairman to limit access to information, disclosure of which might cause harm to the patient or others.

The "facts" presented by the Board psychiatrists, and by facts I include their professional opinions, were obviously facts to which the Board was going to and did indeed apply its mind in arriving at its recommendations. I can see no difference in principle to the approach which should be taken to facts relied on by the Board, but contained in the reports of the Board psychiatrists and those contained in documents, which the Court of Appeal in *Abel* held were subject to disclosure, however conditional.

In my view the Board failed to meet its procedural duty of fairness to the applicants in refusing to allow the applicants and their counsel (or possibly their counsel alone) to be present when the psychiatric members of the Board presented their findings to the Board based on their interviews of the applicants and their review of their medical files.

I conclude as well that it may be of more assistance to the Board in arriving at a just decision if they psychiatric reports are given in the presence of counsel and the patient. The chairman may, in the exercise of his discretion, permit questions to be asked of the psychiatrists to clarify any statements made. Then counsel as well as the patient or his witnesses may be able to respond to some of the assertions of the psychiatrists in such a way as to possibly persuade the psychiatrists to alter their positions. In the result, the reports of the psychiatrists upon which the Board so heavily relies, would then be subject to outside examination.

I say respectfully that the appropriate procedure here would be for the chairman to first inquire of the two Board psychiatrists whether any portion

of their reports should not be heard by the patient in the interest of avoiding harm to him or others. On the basis of that inquiry, the chairman may then rule as to the extent to which the patient should be present, if at all, during the hearing of the reports. The chairman may decide in the exercise of his discretion that counsel alone may be present, on an undertaking from counsel, not to disclose any information so acquired to his client.

The extent to which questions may be asked by counsel or the patient, either directly of the psychiatrists or through the chairman of the Board, is entirely a matter within the discretion of the chairman. It would seem to me not unfair, however, to permit questions of the psychiatrists directed solely to clarifying any part of their reports.

I would allow the application with respect to the second issue raised. I would declare that the Board was under a duty to disclose to the applicants and their counsel the information obtained by the psychiatric members of the Board and that the patient and/or counsel be present during the presentation of such reports subject to the discretion of the chairman.

Counsel for Egglestone also submitted that the procedure of the Board in permitting the psychiatric members to interview the applicant, obtain evidence and present that evidence in private was contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. In my view, if the Board complies with the declaration I have made, the applicants will have been dealt with in accordance with the principles of fundamental justice.

SAUNDERS J. concurs with GRIFFITHS J.

TRAINOR J. (dissenting):—I have had an opportunity to read the reasons of Griffiths J. I am in agreement with that part of his judgment dealing with the ruling of the chairman on the production of hospital and Board records. With respect, I am unable to agree with the conclusion he reached with respect to counsel or the patient being present to hear the opinions of the two psychiatrist members of the Board.

The chairman of the Board, in response to the motion brought before him in the Egglestone matter, gave lengthy and clear reasons for his decision. He was aware that the hospital had advised Egglestone's solicitor that it would pay the cost to have a psychiatrist of the applicant's choice examine the entire file and provide an opinion. The chairman is a retired judge with many years of experience not only as a trial judge but as chairman of the Advisory Review Board. I recommend his reasons to those judges and lawyers interested in gaining some insight into the responsibilities of the Board and its approach to the solution of the difficult problems they face in an area of extreme sensitivity.

In his decision the chairman dealt with the right of a patient or his lawyer to see the notes made by psychiatrists who are members of the Board and with the right to cross-examine those members.

The Right of the Patient or His Lawyer to See the Notes of Members of the Advisory Review Board

The Advisory Review Board is an independent body composed of a Supreme Court Judge as chairman, two psychiatrists not of the facility where the patient is kept, a lawyer and a layman.

They are charged with the duty of reviewing the case of the patient and advising the Lieutenant Governor as to whether the patient has recovered and as to whether in its opinion it is in the interest of the public and the patient that he be discharged absolutely or subject to conditions. The review embraces both medical and public consideration. Four of the five members must agree in order to make a recommendation. The Mental Health Act provides that any member of the Advisory Review Board may interview the patient or other person in private.

The psychiatric members of the Board do not want to form an opinion on the mental health of the patient without first examining him. It makes for a much more adequate review and reduces the margin of error in ascertaining the degree of recovery, the reduction of dangerousness and the recommendation of suitable controls.

It is the practice of the psychiatric members of the Advisory Review Board to interview the patient in private so that along with the other members of the Advisory Review Board they may perform their duties. The same right of interview applies to all other members of the Board. Because there are many cases to review, its members make such notes as they deem appropriate to enable them to discuss the case during the review. These notes are in such form as the maker sees fit. They are much the same as any judge or other professional would make on reviewing a case in which he is about to participate. They may record preliminary impressions. They are an aid to the memory. They are for the use of the maker. To produce them would be unfair to both the maker and to an adequate review.

It is the view of the Chairman that the notes of any member of the Advisory Review Board should not be made available to the patient or his lawyer. They are for the assistance of the members only and are shared, amplified and amended as the review proceeds.

In paragraph (a) of his Notice of Motion, the Motion, the applicant asks for production of "any reports by the psychiatric members of the Board for the purpose of the hearing". Depending on the author, some notes are quite extensive and may be called reports. Regardless of their description, as notes, reports, or by any other name, I have decided that any writing of a member of the Advisory Review Board prepared for the purpose of the review is not to be produced.

Cross-examination of Board Psychiatrist During the Hearing

Now I will deal with the application as it pertains to the right to examine or cross-examine the board psychiatrists or any other member of the board during the hearing. The hearing is only one part of the reviewing function of the Board. The Board wants to hear from the patient and the witnesses who may be members of the hospital staff, the patient, and those who wish to help him; in fact anyone who believes he can help. The Mental Health Act, section 32(5) provides that a Board member may interview anyone in private. The Mental Health Act recognizes peculiar needs of the psychiatric patient; his need to have an opportunity to communicate in private with an individual member of the Board when the Board is conducting its inquiry; the needs of others to communicate without fear or reprisal. In this respect, the Ontario Statute is unique. The Board is seeking to discover whether the patient has recovered from his mental illness and what is in the best interests of the patient who has been found insane at the

time of his offence, and in the interests of the public who wish to be assured he will not offend again as a result of his insanity. It is a collegiate board which does not want to make up its mind until it has heard all the evidence, the submissions of the patient and his counsel, and any other relevant matter. To ask a psychiatric member of the Board for his opinion before a case has concluded is like asking a Judge or Royal Commissioner his opinion during a hearing. If compelled to answer, they find themselves embarrassed in coming to a joint recommendation with the other members of the Board (the statute requires 4 out of 5 to agree). When the Board goes into camera, the members often do change their views during discussion. For 5 different reasons, they may agree on a recommendation. It would be harmful to the Board processes if 1 or 2 members expressed opinions in response to counsel's questions and then, when persuaded by the wisdom of their confreres, join in a recommendation contrary to the expressed opinion. Therefore, I rule on this application, as I have on all other hearings, that the psychiatric members of the Board may not be questioned during the hearing.

In the Egglestone application, the chairman was not requested to simply allow the applicant or his counsel to be present to hear the psychiatrists' views. That request was made in the Mousseau matter.

The law in Ontario is that the Board must act fairly. In *Re Abel et al. and Director, Penetanguishene Mental Health Centre* (1979), 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304 (Div. Ct.); affirmed on appeal 31 O.R. (2d) 520, 56 C.C.C. (2d) 153, 119 D.L.R. (3d) 101, *sub nom. Re Abel et al. and Advisory Review Board,* the issue involved the Board's refusal to disclose any information. The court said that the Board had a duty to disclose the substance of the facts to which it would apply its mind. It need not quote chapter and verse.

In the Egglestone application it is clear that virtually the entire hospital, medical and Board records were made available to counsel for the applicant. The applicant instructed his solicitor not to look at any of the records because of the condition imposed by the chairman. As a consequence he deprived himself of the opportunity of having his solicitor reattend before the chairman to seek an order allowing the applicant to review pertinent parts of the records.

In the Mousseau application a summary of the hospital record was provided. No other hospital or Board records were requested. The applicant did not include in the record before us the summary provided to him. The supplementary record contains material prepared subsequent to the Board recommendation except for a clinical record from the North Bay Psychiatric Hospital dated October 20, 1981. It reads:

> The examination reveals a slim, white male, looking about the stated age of 46 years. He is alert, fully oriented, and memory intact to rough testing. He is pleasant, friendly, co-operative, and can be engaged readily in conversation. He has a tendency to be verbally aggressive and is inclined to talk more than he listens. There is no evidence at this time of a serious thought disorder and he denies all delusional and hallucinatory phenomena. The affect is appropriate. He displays at least average intelligence. There is a disconcerting aspect that is elicited from the history and this examination and that

is that he is an active alcoholic and he does not have true insight regarding this affliction. He does accept supervision and he does have a girlfriend who is a good influence. It is recommended that he be persuaded if possible and coerced, if necessary, into taking a programme for treatment of addiction. The supervision is to be increased and monitoring arranged so that if he slips, he can be readily readmitted. Otherwise, there is no change.

Similarly, in the Egglestone matter evidence available to counsel and perhaps to the patient revealed:

SEPTEMBER 2, 1981: Psychological assessment on Mr. Egglestone was attempted. Unfortunately, Mr. Egglestone declined to be involved with any further assessment; saying that he felt we had enough information and that he could see no use for more testing. He also refused to undergo an assessment of his sexual preferences. It was explained to him that the information gained from this assessment would help us determine the progress he has made but he still refused.

ORDER-IN-COUNCIL — October 15, 1981: "The Advisory Review Board recommends NO CHANGE in the status of this patient."

PSYCHOLOGICAL EXAMINATION — December 14, 1981: The M.M.P.I. profile is indicative of a person who tends to minimize or understate his problems in social and emotional adjustment, who is egocentric, demanding, rebellious and shallow in his feelings and loyalties. It was noted that Mr. Egglestone scores consistently high on the O-H scale. This would indicate that he is over controlled for aggressive hostility and has a potential for periodic explosive violence. Previous measures of intelligence have found him to be functioning in the average range of intellectual functioning. Mr. Egglestone appears to have little insight into his own attitudes or behaviour and there are indications that he has a potential for periodic explosive violence. The personality assessment would support a diagnosis of Personality Disorder, Anti-social Type.

CONFERENCE — March 8, 1982: This patient is not receptive to the Social Adaptation treatment program. He is passive resistant and is at the moment using his lawyers as therapist rather than the clinical staff. It is the recommendation of the treatment team that there should be no change in this patient's status.

HOSPITAL RECOMMENDATION: NO CHANGE.

The applicants say they were not treated fairly. They were not entitled to "chapter and verse" but to know the substance of the facts or as Lord Denning M.R. said in *Re Pergamon Press Ltd.*, [1971] Ch. 388, in a case involving inspectors, "an outline of the charge will usually do."

If the psychiatrist members of the Board have any obligation of disclosure it must in my view be confined to pertinent facts of which the applicants are unaware. The record before this court does not disclose that the findings made by the psychiatrists, as a result of their private examinations of the applicants, were substantially different than the facts and opinions contained in the medical and Board records. I cannot conclude that the applicants were taken by surprise or that they did not have available sufficient information to know the case they had to meet.

I have no doubt that if a situation arose where a member of the Board, because of a private investigation or interview with the patient or others, discovered some previously unknown material fact that was not otherwise in

the records available to counsel or the patient, before acting on the information he or she would be required to disclose that evidence to the patient or counsel. Disclosure is always subject to the sensitive considerations involved in dealings with patients of a psychiatric hospital.

The opinions of the psychiatrist members of the Board are important. All members of the Board have numerous sources of significant professional and non-professional advice and assistance. The members of the Board are intelligent, experienced individuals and I have no reason to think any one of them would be overwhelmed by the opinion of any other.

The very fact that this Board has two psychiatrists as members who conduct independent examinations of each applicant prior to a hearing provides a check on the system that is invaluable. It can only work for the welfare of the patient and should not be discouraged.

The scheme of the legislation is investigative more than adversarial. The hearing itself cannot be conducted in an adversarial atmosphere for a number of reasons directly related to the welfare of the patient and his successful treatment. The underpinning of medical and psychiatric opinion often cannot be disclosed because of the detrimental effect disclosure would have on the patient, the staff and the public.

The Legislature has provided that members of the Board may investigate and recommend. That dual responsibility is unusual if not unique. It is foreign to an adversarial proceeding but it is the law.

The opinion of a psychiatrist member, following an interview with the patient, must at best be tentative. I have no doubt that other members of the Board form tentative opinions from reading the clinical and Board files. They are no different than judges. Final opinions should be reserved to the conclusion of all of the proceedings, including the constructive input from each member of the Board during their deliberations.

Barring knowledge gained by a member or members of the Board of previously unknown and undisclosed salient facts upon which the Board is going to act, the Board members, professional or otherwise, are not required to disclose tentative opinions to counsel or to the patient. This must be left to the discretion of the Board and its chairman.

In both applications the opinions of the psychiatrists were transcribed and became available to counsel and the applicants prior to any decision by the Lieutenant-Governor in Council. The record does not indicate that a petition was made to cabinet by either applicant, a proceeding that might be anticipated if unfairness or injustice was a factor in the Board's recommendations.

I would therefore dismiss both applications.

Applications allowed in part.

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Appendix C

To All Administrators:

Suggested 1984 format for the assistance of Administrators when reporting to the Lieutenant Governor's Board of Review.

The Administrator's report becomes the cornerstone of the inquiry. It is studied carefully by everyone. Invariably it is included in the documents presented by the Advisory Review Board to the Lieutenant Governor-in-Council and may be read by the members of Cabinet. It forms a permanent part of the Advisory Review Board files and will be referred to during the lifetime of the patient's Warrant. The following captions and explanatory notes are for your assistance and in the interest of uniformity. Where possible the same order should be followed.

1. Full name of patient and date of birth. The charge and present diagnosis.
2. INTRODUCTION — A brief statement of the patient's admission to the hospital showing date of admission, the charges and findings of the court showing the date of court orders and the date of the Lieutenant Governor's Warrant.
3. ORDERS-IN-COUNCIL EACH YEAR SINCE ADMISSION — Only one operative part of the order need be mentioned, and where there has been no change, all that need be indicated is "Order-in-Council 19 __ — no change."
4. PREVIOUS ADMISSIONS TO HOSPITALS AND PSYCHIATRIC FACILITIES — In separate paragraphs show each hospital admission, date and duration and diagnosis.
5. CRIMINAL OFFENCES — Show date of each offence and disposition of the charge. This includes juvenile offences. Distinguish between property and person.

6. OFFENCE ON WHICH ACCUSED FOUND NOT GUILTY BY REASON OF INSANITY OR UNFIT FOR TRIAL — Show date of offence or offences and date of finding of not guilty by reason of insanity or unfit to stand trial. This should be described objectively and in sufficient detail so that the Advisory Review Board will be informed of the nature of the act and the accused's conduct at the time. This will be reviewed with the patient by the Board and he will be asked if it is a reasonably correct description. It is important that the patient be seen in the terms of the offence, how he saw himself before, at the time of the offence, and at the time of the review. The patient's own insight into his conduct is paramount.

7. HISTORY — This should contain a condensation of the psychiatric history with emphasis on previous mental illnesses and deviant conduct. The family history is relevant. Where the patient has been hospitalized or involved in the correctional process, the patient's own account is important. This will include:

Family history of mental illness
Pregnancy and birth
Early development — malnutrition, training, disease, injury, abuse or neglect
School
Occupation
Social
Sexual
Psychiatric history
Mental Status

If offence has sexual connotation, was there any sadistic element.

If offence arson, was it associated with sexual arousal.

Response to treatment.

Present adjustment

Social supports

Community attitude towards offence and patient.

Is patient dependent on medication, who will monitor it and will patient cooperate.

In the event the patient's Warrant is loosened to permit his entry into the community, what are the anticipated social stresses.

8. COURSE IN HOSPITAL SINCE ADMISSION — It is important to know how the patient has settled in as seen through the eyes of those in daily contact with him.

9. CONFERENCES — It is usual for the patient to be conferenced at regular intervals. A Summary of the conference findings and recommendations should be included.

10. OMBUDSMAN — Whether he has been involved in the patient's case, his findings and recommendations, if known.

11. POLICE — If the patient has been allowed into the community and the police are aware of it, then a brief note as to the police impressions of the patient is helpful. In a great majority of cases the patient will be quite responsive to the programme of monitoring set up by the Administrator and will live with it. However, there are cases where the patient rejects the programme, exhibits hostility, becomes involved with alcohol, drugs, and associates with undesirable characters. In the patient's rehabilitation, his introduction into the community is critical. A few patients will regress and it is essential that the signs of regression be discovered early.

12. REPORT OF SOCIAL SERVICE DEPARTMENT OF FACILITY — This is of particular value where the patient's Warrant has been loosened to permit him to enter the community. His peers can have a definite influence on him.

13. RECOMMENDATIONS — The Administrators' recommendations to the Advisory Review Board are important. They should deal with three things. (1) The recovery of the patient. (2) What is in the best interests of the public. (3) What is in the best interests of the patient. If possible the Administrator should deal separately with each one of these. The Administrator may request his Medical Director, or a member of the professional staff, to express an opinion and make it part of his recommendations.
Note: "recovered" is not to be interpreted solely within section 16 of the Criminal Code but means being free from mental illness, deficiency or psychopathic disorder and as a result being no longer a danger to himself or the public.

In making the recommendation it is well to bear in mind the following:

(1) DISCLOSURE OF REPORT

In all probability that the report will be given to the patient's lawyer, and sometimes to the patient if he is not represented by a lawyer. The Administrator may be asked for it by the patient's lawyer before the hearing and will exercise his discretion as provided in the Mental Health Act. At the hearing, the lawyer for the patient, or the patient, may ask for it. The Chairman will exercise his discretion as to its production. Sometimes the reports contain information that

ought not to be disclosed to the patient. It may not be in his interests to know. It may place third parties at risk. It may be against the policy of the institution. When those situations arise, the Chairman of the Board should be alerted and a ruling will be made at the time of the hearing.

(2) COMPARISION WITH CRIMINAL SENTENCE

Do not compare the indefinite term of the Lieutenant Governor's Warrant with a possible sentence had the accused pled guilty. Detention under a Lieutenant Governor's Warrant is for treatment not punishment.

(3) THE ADVISORY REVIEW BOARD AND THE REGIONAL REVIEW BOARD

Do not confuse the Regional Review Boards with the Advisory Review Board. The Regional Review Board deals with civil commitments and treatment. The Lieutenant Governor's Advisory Review Board deals with patients who have usually committed some violent crime and have escaped punishment because they were insane. They have become Wards of the Lieutenant Governor to be safely kept until they have recovered and it is in the best interests of society and in the patient's own interest that the Warrant be modified or vacated. It will be seen at once that the Lieutenant Governor's Advisory Review Board is charged with a much different responsibility and it must direct its investigation towards three things: (1) recovery of the patient and whether it is temporary or permanent; (2) the best interests of the patient, and (3) the best interests of society. It is an intricate medical-social problem.

(4) With the exception of Penetang where there is a special Clinical-Legal Liaison, the Administrator should be present at all hearings. It is also desirable that the Medical Director should attend. If the Medical Director has no personal knowledge of the case then the attending physician should attend.

(5) The patient's file and clinical record should be available.

The Honourable Edson L. Haines, Q.C.
Chairman,
The Lieutenant Governor's
Advisory Review Board.

January, 1984.

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Appendix D

Consent to Disclosure of Certain Portions of The Advisory Review Board File

I, _____ , of _____
(patient's name) (address)

in the _____ of _____ , hereby consent

to the disclosure to or examination by my _____ ,
(lawyer or doctor)

_____ , of certain portions of the Advisory

Review Board file relating to me _____
(patient's name)

including the following documentation:

(1) copies of all Warrants of the Lieutenant Governor pertaining to me;

(2) the reports of the Administrator(s) of the psychiatric hospital(s) to the Advisory Review Board;

(3) the recommendations of the Advisory Review Board to the Lieutenant Governor in Council with copies of all exhibits filed at any hearing;

(4) the opinion of each psychiatric member of the Board dictated at the conclusion of each hearing and attached to each Advisory Review Board recommendation.

The foregoing examination is to be made on such terms as the Chairman deems appropriate. I acknowledge that the use of such documentation is limited to any review conducted or hereinafter conducted by the Advisory Review Board and for no other purpose.

And for permitting such disclosure or examination this shall be your good, sufficient and irrevocable authority.

DATED the _____ day of _____ , 198__ , at _____ .

_____ WITNESS

_____ PATIENT

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Appendix E

Undertaking by Lawyer or Doctor Concerning Materials in the Advisory Review Board Files

I, _____ , having been retained to
(lawyer or doctor)

act on behalf of _____ ,
(patient)

acknowledge and agree that the disclosure to me of the foregoing materials is limited to me for the purpose of discharging my professional duties and acknowledge that such disclosure is to be made on such terms as directed by the Chairman of the Advisory Review Board. I acknowledge that, in the event I wish to make disclosure to others including the patient _____ , an application is to be made to the Chairman outlining what and why such disclosure is sought.

DATED at _____ , this ____ day of _____ , 198 __ .

_____ WITNESS

_____ LAWYER OR DOCTOR

Appendix F

"The Real World"

Paper Presented to The Eighth Annual Conference of Advisory Review Boards

Ottawa, Ontario

September 22, 1980

By

R.E. Stokes, M.D., D. Psych., F.R.C.P.(C)., F.A.P.A.

The subject I am about to address, "The Real World in a Maximum Security Hospital" is an ambiguous challenge for a practicing psychiatrist. For most of my colleagues that "Real World" exceeds in unreality the fantasy world of their most psychotic patient. It is a world that has both from within and outside, undergone turmoil and change during the fifteen years that I have been familiar with it.

It is necessary at this time to provide some description of the facility in order to encourage a perspective. The Mental Health Centre, Penetanguishene, consists of two divisions: A modern Regional Psychiatric Facility of approximately 230 beds and a Maximum Security Facility, Oak Ridge, of approximately 300 beds. At this time, since it is immediately preceeding the annual visit of the Advisory Review Board, we have our largest number of patients under a Warrant of the Lieutenant Governor. There are eight such patients in the Regional Division and 132 in Oak Ridge; nine of those patients are considered Unfit to Stand Trial, the remainder were found Not Guilty by Reason of Insanity. The other patients in Oak Ridge are there because of violence and unmanageability in other psychiatric Hospitals; a small number are referred from the Penitentiary service. Thus it is apparent that no more than 26 percent of our patients are under a Warrant of the Lieutenant Governor. I am intrigued that one quarter of our patient population can consume more staff time, directly and indirectly, that is not pertinent to psychiatric treatment; that the Ombudsman's office attends more of those patients in one month than the rest of the patients in six months.

The Oak Ridge Division is divided into two treatment units, the Activity Treatment Unit provides treatment for those patients with impoverished verbal skills, consequently the more psychotic and intellectually limited patients are found on that unit. The Social Therapy Unit provides a unique therapy programme for those patients with adequate verbal skills to enable them to participate in the therapeutic community concept of treatment. This is a pervasive, ubiquitous treatment that forms the milieu of the Unit. Incorporated into it is some chemotherapy for patients with lesser degrees of psychosis, vocational therapy, recreational therapy, general medical care and dental care, but the mainstay is an intensive inter-relationship of patients in small and large groups. The whole life style of the patient is affected by his peers. His techniques of dealing with other patients becomes scrutinized and discussed in terms of contemporary mores, the expectations of society and the attitudes of those closest to the patient. Needless to say, it is our experience that the most apparently motivated accused appearing before the bench is strangely transformed on passing through the portal of Oak Ridge into a patient resistant to therapy and the notion of change.

The concept of an indeterminate admission to hospital for treatment is customarily viewed by the patient in the same manner as many jurists and counsel view it; a punitive life sentence of incarceration. Fifteen years ago

the alternative was not life imprisonment in many cases but hanging. Oak Ridge at least offered life. The right to treatment was a primary concern since there were only two psychiatrists in the whole Mental Health Centre. Today we have ten psychiatrists buttressed by multidisciplinary treatment teams and the patients are more preoccupied with the right not to be treated.

The Social Therapy Unit developed its unique programmes to offer treatment and conduct research into better techniques of treatment for patients with vexing problems for psychiatry, lawyers, courts and penologists, the psychopathic or antisocial personality disorder. These tragic individuals traverse a considerable span of their life as predators of society, lacking a moral sense of conscience, relating superficially with little loyalty, their own satisfaction a foremost consideration and often endowed with superb manipulative skills. These patients provoke our greatest concern for hostage-taking and escape. They utilize all available resources to achieve their immediate wishes including the courts, gullible counsel, gullible therapists and gullible concerned citizens. Their greatest ally is the enlightened legislator. Their greatest enemy is seclusion or inaccessibility to their tools of manipulation.

The social climate, the legislation, the inattention by counsel permitted active innovative therapeutic programmes to be developed and established. One would be remiss if credit were not given to Dr. Elliott Barker who was instrumental in the genisis of these programmes. The last three years have seen five different Directors of that Unit. The patient may refuse treatment or may wish to modify the treatment programme in such a manner as to sabotage either his own treatment or the treatment of others. Initially this is supported by the amateur lawyers in his peer group but soon supported by professional counsel and failing that, the Ombudsman. It is fair to state that in the majority of instances the sensibility of counsel and the Ombudsman vindicates the treatment team but the damage is done. While the investigation proceeds, treatment stops, staff become frustrated, some patients become frustrated and others seek a similar route of opting out. Once the matter is settled it is not long before the process is repeated either with a new thrust in the complaint or by using family, politicians etc. to champion their cause.

Unlike the psychopath, most of our staff profit by experience; the occasional one who does not, we call dedicated. Psychiatrists will all too often give up rather than take time away from clinical activity to participate in legal debates. This results in two events: the effective programmes that are challenged the most are curtailed leaving the more comfortable programmes that are unlikely to result in the desired recovery of the patient: the Psychiatrist seeks other areas of clinical endeavour and leaves Oak Ridge. In either event, the patient loses and society loses.

Recently a patient with a long history of assaultive behaviour challenged

one incident of assaultive behaviour that was reported on the Clinical Record. Notwithstanding the confidentiality of the clinical record, it was pointed out that such information may form the basis for recommendations by the Advisory Review Board, the potential for transfer or discharge. For that reason it was recommended that if it is not practical to investigate such an incident it should be clearly stated on the clinical record that it was not substantiated. Moreover, it was recommended that a "Caution" Sheet be attached to the clinical record to state that the allegation was not investigated and not substantiated. Although all of this sounds reasonable at first reading, have you pondered how this would be achieved in a facility like Oak Ridge where more than twelve assaults of patient to patient, patient to staff occur every day. The files on some patients would contain more caution sheets than clinical data and somewhere within those caution sheets would be one that states that this patient is allergic to penicillin or this patient must not be discharged without notifying the Crown Attorney.

This anecdote serves to introduce a concern psychiatrists have regarding the increasing intrusion of the adversary system and due process into the practice of medicine. I believe some of the current trends in these areas will do considerable to jeopardize the role of the psychiatrist and the provision of mental health care. In an attempt to protect the rights of the mentally ill a series of legal constraints have been placed on the psychiatrist based on the concern that psychiatrists may abuse their authority. If we go back several years there were two systems by which an individual could be deprived of their freedom by law. The Criminal Justice System had specific statutes, procedural safeguards and required evidence to support proof beyond a reasonable doubt. The Civil Committment of the mentally ill had imprecise statutory definitions, no procedural safeguards and no standard of proof. The current trend is to impose the model of the Criminal Justice System on the Civil Committment System.

Dr. Alan A. Stone, Professor of Law and Psychiatry, Harvard University, evaluated the courts and the Criminal Justice System from two perspectives. The first was a moral forum for determining guilt or innocence that respected the rights of the individual. The second was as the most powerful decision-making body in a huge bureaucracy to which the state assigns responsibility for controlling crime. He observed that from the second perspective, judged by its effect on crime, the Criminal Justice System is counterproductive and there is no reason to hope that imposing the procedures of one failing system on another will lead to improvement. As a moral forum he noted that of 94000 felony arrests in New York, only 550 trials resulted. If every felony had access to the moral forum, New York City would be bankrupt and many of its citizens would spend their productive years in the jury rooms. His intention was to emphasize the hazards of wholesale application of the procedures of the Criminal Justice System to the Civil Committment System.

Dr. Stone further pointed out that as a definition of conduct becomes the focus for Civil Committment, we examine narrow behavioural events rather than mental status or psychopathology. This drastically reduces the professional input of the psychiatrist into the process. Most psychiatric treatment is based on the mental disease rather than behaviour, consequently this method of selecting involuntary patients undermines the treatment orientation of those required to care for the patients.

There is in some jurisdictions a belief that every patient be provided with a lawyer and one may anticipate that the lawyer will be an advocate for freedom rather than what is in the best interest of the patient. This is often regarded as supporting the Adversary System except that the psychiatrist, often unwillingly, finds himself in the role of prosecutor which leads to professional sterility and sabotages any therapeutic relationship that may have existed. It seems that funds are allotted to provide counsel for patients only.

The most difficult issue for the psychiatrist is to consider the concept of the right of the patient to remain silent or that the popular caution be administered before a patient is permitted to speak. I do not practice medicine without a history, an extensive inquiry into all systems including the mind and an examination of the patient. This process may include far more than is subsequently realized to be necessary, however, one does not carry out a clinical investigation based on hindsight. If one is to consider the state of mind of the patient surrounding an event, it is impossible to avoid an in-depth study of feelings, attitudes, motivations, fantasies and thoughts regarding every aspect of the event, past events similar or dissimilar and attitudes toward future events. We are often asked to carry out such an assessment, the completeness of which appears to be determined by time rather than quality of information and directed not to discuss the event with the patient.

An area that has provoked misunderstanding and frustration is communication. This is an activity in which psychiatrists have considerable expertise, yet the commonest complaint I hear from lawyers is the inability to comprehend what the psychiatrist is saying. Sometimes the psychiatrist forgets he has left the clinical rounds and communicates in his customary fashion as though with a colleague. Sometimes the lawyer prefers not to understand what is being said — it does little to assist his cause. Most of the time, the psychiatrist is unsure what language to use. Lawyers tend to believe in the magic of words, we do not. The courts use many "Humpty Dumpty" words. You will recall that in the story of Alice in Wonderland, Humpty Dumpty said, I can use any word to mean what I want it to mean. Throughout the years many words have been acquired from the medical vocabulary, then a meaning given to them different from the meaning we are accustomed to. Moreover, if this is done by certain levels of the Courts, the new meaning becomes binding not only on the courts but also the physician. I suspect that most of you have used the word Sadist in the context of a person who tends to

be cruel to others. To a psychiatrist this is a person who has a particular sexual deviation — like the Marquis de Sade — in which the final preferred sexual activity is inflicting pain on the partner rather than vaginal intercourse.

The more significant words that have been taken over are words such as insane, a word rarely used by physicians outside of court or a maximum security facility. In medicine it is an anachronistic term. Psychiatrists in the past used the word to describe major mental illness resulting in loss of reality testing. The court uses it to cover mental illness, mental deficiency and a strange conglomeration of other conditions provided that they cause the individual to be unable to appreciate the nature and quality of the act or ommission or to know that it is wrong. You may imagine the consternation of many psychiatrists who have rarely encountered psychosis in a person suffering from a psychopathic personality disorder, to learn that the court has declared some to be insane. Moreover, most psychiatrists believe that beyond the passage of time, there are no effective techniques for changing that type of patient's behaviour in a consistent fashion. Nevertheless the psychiatrist in a maximum security facility is often required to treat such patients and then is expected to continually assume they are insane, since they have changed little or not at all. If the individual suffers from a psychotic illness such as schizophrenia or manic-depressive disorder and has a flamboyant departure from reality, there appears to be little difficulty communicating one's opinion to the court, provided of course that you check your terms in the legal dictionary and not the medical dictionary. Recently I learned that the term, "Disease of the Mind" has now been purloined by the courts and defined. The definition is interesting but hardly acceptable for use in the practice of psychiatry.

The greatest confusion comes from the world automatism. Few physicians have not encountered the apparently purposeful behaviour in a patient who is in a semi-conscious state. If the state is brought on by alcohol intoxication then it does not qualify. In an obvious attempt to assign culpability, meaning was further confounded by qualifying the state as insane or non-insane. Why not use culpable or non-culpable? How do you define the state when it results from diabetes that has not previously been diagnosed in the patient compared with a diabetic patient who knowingly refuses to take insulin and enters such a state?

I have often heard what appears to be different psychiatric opinions both in the court and before the Advisory Review Boards. In the Adversarial System the difference is the issue usually highlighted. All too often there is no appreciable clinical difference of opinion. The experienced Forensic Psychiatrist uses a court dictionary and the skilled Clinical Psychiatrist uses a medical dictionary. Moreover, the Clinical Psychiatrist with gentle persua-

sion by counsel, is encouraged to use the medical terms but with the legal definitions which not only confuses the clinician but also makes little sense to him.

There is a presumption by many individuals that rapists and child molesters will change their unacceptable behaviour if they have psychiatric treatment. This is usually imagined to be some form of psychotherapy ranging up to one hour per day per patient. It is possible to help such individuals if such behaviour is the result of mental illness. Unfortunately, if the act is particularly distasteful, there is a tendency to believe it must be caused by mental illness. This is not necessarily so. Some of these individuals may not be influenced by any of our current treatment techniques. Many accused we see have been involved in other crimes of violence.

The psychiatrist is frequently asked to comment on whether such individuals are dangerous. If one scans current research studies, there is data to suggest that the psychiatrist has no greater expertise in predicting dangerousness than a variety of non-medical professionals. There are some recent studies that indicate that if the patient is suffering from a major form of mental illness and the illness results in violent behaviour, then the psychiatrist does have greater expertise in predicting dangerousness. Certainly we should not forget that in mentally ill persons, as well as non-mentally ill persons, the best prognostic index is the past history and that hope rarely triumphs over experience.

Some myths shared by many families and counsel for our patients are that psychiatric treatment is some kind of one to one psychotherapeutic activity. Chemotherapy has unpleasant side effects and merely converts the patient into a drugged zombie. Vocational Therapy in the workshops is healthy activity and the patient may learn a trade. Recreational Therapy is a euphemism for sports and playing games.

The most important therapeutic modality in most cases is the pervasive milieu of the ward that does not occur by accident but is a carefully contrived therapeutic environment. Individual psychotherapy of a formalized type is rarely done. Chemotherapy can restore a psychotic person to normal thinking, they do not look like zombies except for a small number and in those cases we suspect that the illness contributes as much to the appearance as the medication. Vocational and Recreational Therapy are techniques, carefully evaluated, to teach patients to work and play appropriately and to interact with others in a manner that helps them to fit back into society. When the patient is free from psychosis and has derived benefit from medication and vocational therapy, he may be involved only with maintenance chemotherapy and the ward milieu; this is often regarded as no treatment. One of our more serious problems and common reasons for exascerbation of the illness is the tendency of patients to believe they no longer require medication when

they feel well. The ability for the W.L.G. patients to be supervised regarding medication can be attributed to the recommendations of the Advisory Review Board.

I should like to close my remarks today with a quotation from Dr. Alan Stone, "I have presented a view of Mental Health litigation that many of the litigating attorneys would violently protest. So be it. I am convinced that the dark side of the picture is real and that the evidence of it is mounting. The legal solutions secured in the courtrooms have established an impressive edifice of due process but beyond that legal structure, human suffering continues unabated and its relief is more difficult to achieve. At the very least, in reviewing recent Mental Health litigation and its effects the question must be asked, Is it really the patients who have had their day in court".

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Appendix G

Oak Ridge Programmes at the Mental Health Centre Penetanguishine

January 3rd, 1984.

The Honourable Mr. Justice E.L. Haines,
Chairman, Lieutenant-Governor Advistory Review Board,
24th Floor, LuCliff Place,
700 Bay Street,
Toronto, Ontario.
M5G 1Z6

RE: DESCRIPTIVE MATERIAL – OAK RIDGE PROGRAMMES.

Your Lordship:

During the latter part of December, you advised me that you were preparing an updated version of the monograph about the Advisory Review Board. You requested that I provide you with descriptive material about the programmes in the Oak Ridge Division, which is to be included in the monograph.

As you are aware, during the year, we have undergone a major reorganization of the Oak Ridge Division. Although there was an overall framework for the reorganization, the actual details of the changes in programming are only now being finalized.

For this reason, it is difficult to provide you with any comprehensive descriptive material about the current programme structure. However, I am

able to supply you with a brief summary of the overall goals and objectives of each of the program units in the Oak Ridge Division. Hopefully, this will serve your requirements.

Yours truly,

L.W. McKerrow,
Administrator.
LWMcK:PH
Encl.

c.c. Mr. David Corder,
Executive Director,
Mental Health Division.

Extended Treatment Unit

PURPOSE:

To provide vocational training, extended treatment, and preparation for discharge for patients who are not management problems within Oak Ridge.

Admission Criteria:

A patient must:

1. Have had a minimum of four consecutive weeks within Oak Ridge during which he has not fought with sufficient force to cause injury, destroyed a room, possessed a weapon, or made a serious escape attempt,

and 2. have complete admission documentation on file (Psychosocial History, Mental Status, and Physical Examination, and recent progress notes from transferring unit),

and 3. be eligible for an off-ward work area,

or 4. be rendered non-ambulatory by physical illness.

A patient should:

1. require preparation for discharge from Oak Ridge,

or 2. require heterosocial skills training, life skills, sex education, assertion training, or social skills program.

or 3. require other specialized programs designed for sex offenders or firesetters.

Discharge Criteria:

Internal:

1. Commission of any behaviour mentioned in Admission Criteria 1.
2. In cases where a patient has been housed on the unit solely because of his medical condition, remission of the illness or sufficient clinical improvement.
3. Commission of more minor misbehaviours than those mentioned in Admission Criteria 1 or a deterioration in the patient's psychiatric condition, plus a recommendation by the Unit Management Team for transfer to an appropriate Unit. The nature of this referral (e.g. time-limited assessment or outright transfer) to be negotiated among the two units concerned.

External:

1. Release decision by the Advisory or Regional Board of Review.
2. Release decision by the unit team based upon a review of patient's progress toward his treatment goals.

Programs:

The programs are of three types: ward management systems, off-ward work programs, and specialized group programs.

Group programs include:

a. discharge counselling,
b. problem solving,
c. theme,
d. sex offender groups (problem identification, heterosocial skills, and sex education),
e. firesetter groups (life skills, assertion training, and problem solving).

Staffing:

Unit Director:	Dr. I. Sirchich
Social Worker:	Mr. D. Roszmann
Psychologist:	
Area Supervisor:	Mr. P. Burns
Unit Clerk:	Mrs. E. Ladouceur

Behaviour Therapy Unit

PURPOSE:

The programs on the Behaviour Therapy Unit provide behavioural treatment for Oak Ridge patients who exhibit dangerous behaviours. In general, the Unit is best equipped to treat patients who are not well suited for traditional verbal therapy, frequently exhibit dangerous problem behaviours within a hospital setting, and are not too old for intensive behavioural programming.

Admission Criteria:

A person meets the admission criteria if:

1. He is an Oak Ridge patient.

and 2. His admission documentation is complete — including psychosocial History, mental status, and physical examination.

and 3. He is over sixteen (16) years of age, toilet trained, able to feed and dress himself and is ambulatory.

and 4. He exhibits problem behaviour(s) within hospital and the problem behaviour(s) are regarded as dangerous.

or 5. In the last twenty-four hours he has fought with force sufficient to cause injury, committed serious room destruction, attempted escape, or possessed a weapon. (1, 2, 3 still hold).

Patients may be referred to the Behaviour Therapy Unit for a time-limited assessment by the treatment team of another Oak Ridge Unit. Application will be made to the Behaviour Modification Unit treatment team. Patients accepted for assessment will be housed on the Behaviour Therapy Unit but will only be admitted to the Behaviour Therapy Unit pending the results of the assessment.

Patients accepted for assessment will usually have committed serious antisocial acts, e.g. threatening bodily harm to others, throwing feces, breaking windows, etc.

Discharge Criteria:

Internal:

A behaviour Therapy Unit patient can be referred for admission to another Oak Ridge Unit if:

1. He has ceased the problem behaviour(s) that resulted in his admission to the Unit.

and 2. He is judged by the Behaviour Therapy Unit team to be ready for discharge from Oak Ridge.

or 3. He requires treatment offered on the referral unit.

External:

A Behaviour Therapy Unit patient can be transferred out of Oak Ridge if:

1. He is discharged by the Regional Board of Review or the Advisory Review Board.

or 2. A patient is judged by the Behaviour Therapy Unit treatment team to have met his treatment goals (i.e. cessation of dangerous problem behaviour) and is not appropriate to another Oak Ridge Unit, but is acceptable to another treatment facility.

Programs:

The primary behavioural treatment technique on the Behaviour Therapy Unit is the Token Economy. Patients earn privileges for showing carefully specified desirable behaviours and lose privileges for undesirable behaviours. The overall structure is designed to assist patients in developing stable acceptable behaviours and move to less secure higher privilege wards.

Treatment programs on the upper ward focus primarily on basic hygiene, work, and appropriate interpersonal behaviours. Improved performance leads to a transfer to the lower ward. Here most patients continue to be assessed daily and increased emphasis is placed on appropriate social behaviour and stable work patterns. Additional privileges are available to those individuals living on the lower ward.

Special programs in addition to the ward-wide token economies are also available. These individualized treatments involve more immediate sanctions for clearly specified behaviours, focus on special problems, and involve special privilege activities, both off and on the ward.

Staffing:

Program Director:	Dr. L.S. Arnold
Social Worker:	
Psychologist:	Dr. G. Harris
Psychometrist:	Mr. W. Carrigan
Area Supervisor:	Mr. L. Bourgeois
Unit Clerk:	Mrs. K. Lotton
Medical Consultant:	Dr. R. Fleming

Forensic Assessment and Treatment Unit

PURPOSE:

To assess and provide court reports for men referred by the courts regarding fitness to stand trial, possible application of Section 16 of the Criminal Code of Canada, bail eligibility, dangerousness, and possible post-remand disposition.

To provide short-term treatment for Warrant of Remand patients assessed as unfit to stand trial. Such treatment is to be undertaken either during the period of the Warrant or for a reasonable period after that time (approximately two months).

Admission Criteria:

Assessment:

To be eligible for admission the person must meet *one or more* of the following criteria:

1. charged with or convicted of a personal injury offence,
2. documented need for maximum security,
3. documented history of violence showing an escalating pattern, with *one* of the following documentation:

a) Warrant of Remand under the Criminal Code of Canada,

b) Warrant of Remand under the Mental Health Act,

c) Involuntary status under the Mental Health Act.

Treatment:

To be eligible for admission the person must meet *all* of the following criteria:

1. average intellect and literacy,
2. non-psychotic diagnosis or a state of remission in the case of a psychotic diagnosis,
3. an expectation that a substantial period of treatment, i.e. six months or more, is required.

Discharge Criteria:

Assessment:

1. Patients are discharged from the program by the end of the thirty or sixty day period specified on admission documentation.
2. Patients who are assessed as clearly unfit to stand trial may remain for a further period of treatment of approximately two months.
3. Patients who have minor charges which are withdrawn or patients not responding within above time periods may be referred on agreement to other hospital programs.

Treatment:

Patients may exit the program:

1. when there is evidence of satisfactory progress with identified problems,
2. when there is evidence of lack of progress and no likelihood of improvement, or when treatment in another program area seems indicated,
3. when in the case of a psychotic illness there is serious deterioration such that it appears to be in the patient's best interests to move to another program area.

Programs:

Assessment:

1. Assessment Teachers – a small group of patients who supervise Assessment Groups 1 and 2 as part of their own treatment and rehabilitation programs.
2. Assessment Groups – for newly admitted patients, assigned at the discretion of Ward Supervisor to either Group 1 or 2 depending on apparent level of ability or mental status.
3. Pilot Program – a program run specifically for psychotic patients.
4. Social Adaptation Treatment Program – for patients who are assessed as suffering from a severe form of personality disorder and who are not able to therapeutically benefit from existing programs elsewhere in the hospital.

Treatment:

1. Therapeutic Community Program – operating under a committee system where interpersonal interactions are the main focus of attention.
2. Pilot Programs – a program run specifically for psychotic patients.

Staffing:

Unit Director:	Dr. R.L. Fleming
Case Historian:	Mrs. C. Schmitz
	Mrs. D. Carrigan
Psychologist:	
Psychometrist:	Mr. M. Helzel (half-time)
Area Supervisor:	Mr. J. Lachapelle
Unit Clerk:	Mrs. S. Reeves.

Admission, Assessment and Treatment Unit

PURPOSE:

To assess on admission and from the assessment devise and implement a treatment plan.

To treat the patient until he has either recovered from the mental illness or the behaviour has been sufficiently modified to warrant a discharge or transfer to the refering facility, or until transfer to another Oak Ridge Unit is effected.

Admission Criteria:

A. (1) The patient must be certifiably mentally ill. Physicians at the referral source must judge that the patient they wish to admit suffers from a mental disorder of a nature or degree so as to require his involuntary hospitalization in the interest of his safety or the safety of others.

or

(2) The patient must be detained on a Warrant of the Lieutenant Governor of Ontario.

B. The patient must be sufficiently dangerous to justify his being kept in our maximum security hospital. The definition of dangerousness depends partly upon the reference source. If the patients come from Federal Penitentiaries and provincial correctional facilities, or are W.L.G.'s, they are by definition dangerous enough to warrant our maximum security. Patients from county or district jails fit our criteria for dangerousness only if their charges are severe enough that if convicted they would normally go to a provincial correctional facility or federal penitentiary. If a patient is being held in jail on minor charges but his behaviour is so disturbed and violent that jail is no longer appropriate but a regional psychiatric hospital could not contain him, then he also fits our criteria for dangerousness.

C. Patients referred from other psychiatric or from retardation facilities are dangerous to warrant our maximum security hospital depending upon:

(1) The recency of the dangerous behaviour. The condition that the patient be admitted as soon as possible after the dangerous behaviour must be satisfied.

(2) The frequency of the dangerous behaviour. That the frequency of the dangerous behaviour be high is a desirable condition for admission, but not a necessary one. For example, we would

accept a patient who had severely assaulted another person in a regional hospital, even if severe assaults occurred infrequently.

(3) The type of dangerous behaviour. The patient admitted must have behaved in a manner that has caused or would cause, directly or indirectly, serious physical injury, psychological harm, or even death to others.

Discharge Criteria:

1. Following assessment, patient is deemed suitable for treatment modality not available on this unit, i.e. Behaviour Modification, Committee System, or special programs, e.g. I.S.A.P. (Inappropriate Sexual Arousal Patterns). These transfers are to be arranged in consultation with Unit Directors and Area Supervisors.
2. Discharged by Advisory Review Board, or Central Ontario Board of Review.
3. Patient is sufficiently recovered to warrant transfer to referring facility.

Programs:

A. On the Admission Ward (05):

(1) Assessment group for patients of average and above intelligence. The patients are assessed as to diagnosis and the appropriate treatment modality is instituted. The methods of assessment are clinical, psychological, and groups.

(2) Assessment group for patients of below average intelligence. A clinical assessment as to diagnosis and the treatment indicated is made. the assessment tools are clinical, psychological, and groups.

(3) Pilot program. This is a program run specifically for psychotic patients.

B. On the Psychotic Ward (03):

(1) Pilot Program. As above, run specifically for psychotic patients.

(2) M.A.P. program. This program is designed for patients who have failed in their treatment program because of the absence of motivation, attitude or participation.

(3) Psychotic progressive care program. This is for patients in chemical remission and involves them in work therapy.

Patient-teachers will be required on both wards.

Staffing:

Unit Director:	Dr. J. O'Reilly
Physician:	Dr. E. Camunias
Social Workers:	
Psychometrists:	
Area Supervisor:	Mr. L. Moreau
Unit Clerk:	Miss S. Piitz

Appendix H

On the Assessment of Sex Offenders at Oak Ridge

Vernon L. Quinsey

Assessing sex offenders for possible release from Oak Ridge involves balancing the protection of the public and the right of each offender to the least restrictive disposition. These assessments are extremely difficult for a variety of reasons, the most important of which is the necessity of combining various sorts of information of varying relevance and importance to arrive at a fair decision. The difficulty resides not only in the comination of information but in judging which types of informatiuon should be used when there are often few data to support the validity of each type.

The purpose of this brief paper is to outline which sorts of information are most likely to be relevant, to describe the information whcih is provided by the Oak Ridge Sex Offender Program, and to outline the rationale for the types of treatment which are offered at Oak Ridge.

Predictors of Recivisism

The best predictor of future behavior is usually past behavior; for sex offenders the probability of a new sex offense increases with each past offence. The type of sex offence is also related to recidivism; among child molesters, men who have chosen male victims are approximately twice as likely to reoffend as those who have selected female victims. Incest offenders (father-biological daughter) tend to have low recidivism rates. Sadistic features (torture, gratuitous violence, the selection of very young or very old victims) tend to be related to higher rates of recidivism. Rape of adult females (without sadistic features) tends to be associated with low sexual recidivism but recidivism increases with the number of prior rapes.

Although the differences in recidivism rates presented above are very important, they are inherently unsatisfactory because they cannot, being historical, change. Thus, these static predictors, if used alone, would result in the same decision each time the offender was assessed, even if he were to be in Oak Ridge for 100 years. The problem is most acute where an

offender has committed one very serious offence; the prediction in this case is that the offender has a low probability of committing another extremely serious offence.

The assessors' difficulties are exacerbated by the fact that the probability of future sexual offending does not decline dramatically with age, as does the probability of repeating a property offence or (somewhat less dramatically) repeating a nonsexual assault.

Because static predictors do not change, some assessment of the offender's current functioning is necessary. Because indicators of current functioning can change over time, they are termed dynamic predictors. Dynamic predictors must be indirect measures because there is usually no opportunity for the commission of child molestation or heterosexual rape within Oak Ridge. The selection of relevant and important dynamic predictors must be guided by data which link them to recidivism as well as by a coherent conceptualization or theory of sexual offending.

Which dynamic variables have been associated with sexual recidivism? In terms of post-release behavior, the following variables have been associated with the commission of new sexual offences: (a) Sexual fantasies involving the types of activities which are of concern, (b) failure to initiate and maintain appropriate sexual relationships with adult partners, (c) beliefs that antisocial sexual behaviors are appropriate, and (d) alcohol abuse. Some of these variables can, of course, be indirectly assessed in a pre-release environment. Finally, there is indirect but persuasive evidence that continuing periodic treatment in the community reduces recidivism rates.

Note that the above indicators have been shown to be directly related to sexual recidivism; there are other indicators, however, which appear relevant but for which there is less evidence. These variables relate to the amount of stress which an offender is likely to experience upon release, his capacity to engage in rewarding appropriate activities or, more simply, affect his judgement. These indicators include: criminal identification, deficient social skills, deficient life skills, poor academic or vocational skills, mental retardation, psychosis, homeliness, and low self esteem. Some of these variables are directly important in predicting nonsexual recidivism, as well, for patients for whom that is an issue (in particular, criminal identification).

Certain commonly used indicators are not related to sexual recidivism and but weakly related to general recidivism. Specifically any test of personality (e.g. Rorschach, MMPI), length of incarceration and institutional adjustment. Institutional adjustment is important, however, in deciding which level of security is appropriate in which to house a patient who is not about to be released. Other predictor variables involving measures of brain anomalies, such as temporal lobe damage, have been used in some

preliminary studies attempting to differentiate sex offenders from others but not yet in predictive studies. The predictive value of brain anomalies in the assessment of sex offenders therefore, is completely unknown.

Clinicians often rely on vague clinicial impressions involving the sex offender's "insight" and acceptance of personal responsibility. There is no evidence, however, that clinicians can agree among themselves on whether a patient in fact has insight or accepted responsibility, much less that these variables are related to recidivism. Patients, of course, are under a great deal of pressure to dissimulate in order to secure their release. Understandably, therefore, patients will adopt the explanations of their behavior which are proposed by their therapists. This apparent agreement between the patient and the therapist is what is termed insight. More generally, however, dissimulation affects any variable which the patient can control; in my view, dissimulation is not so much an indication of fundamental dishonesty as it is a natural consequence of the patient learning the rules of how to obtain his release.

The only dynamic variable which has been shown to differentiate sex offenders from others (including non-sex offenders, low socioeconomic status non-offenders, etc.) is psychophysiological measurement of sexual preference. This indicator involves monitoring the offender's penile responses to various sexual and nonsexual stimuli (slides and stories). Measures of sexual preference also differentiate among sex offenders with different kinds of offence histories and have been related to sexual recidivism.

Because of the importance of measures of sexual preference, it is important to understand what can and cannot be inferred from them. Below is a list of issues and cautions which must be borne in mind when interpreting sexual preference data.

1. The results are not infallible. The testing situation is psychologically complex and careful control of variables such as instructions and the nature of the stimuli is important.
2. Not all sex offenders have inappropriate sexual preferences. One time offenders, in particular, occasionally have normal sexual preferences.

With these caveats in mind, how should sexual preference data be interpreted? First, the issue of interest is not absolute responding but relative preference; i.e. what is important is whether an individual responds a lot less to inappropriate as opposed to appropriate sexual partners or themes. Inappropriate sexual preference either involves a failure to discriminate among appropriate and inappropriate stimuli or (worse) a definite preference for inappropriate stimuli. A testing result of inappropriate sexual preferences means that the offender is sexually

aroused by the presentation of inappropriate stimuli; it does not necessarily imply that the person will act on these preferences.

Efforts are made in the Sexual Behavior Laboratory to help the offender learn to control undesirable sexual arousal. The issue here is self control not "cure." It has been shown that the more "normal" the testing results appear after treatment, the lower the recidivism rate in the short term (12-24 months).

In summary, laboratory measurement of sexual arousal reveals responsiveness to various sexual cues. Changes in sexual arousal patterns which occur as a result of treatment indicate increased ability of the offender to control his arousal. The goal of treatment is realized when the patient transfers his ability to control his inappropriate sexual arousal acquired in the laboratory to the real world. It is important, therefore, that the patient believe that he has acquired a general skill.

Treatment Program

The Oak Ridge Sex Offender Program is designed to help patients understand the reasons for their offences, modify inappropriate sexual arousal patterns, impart sexual knowledge and awareness of community values, and teach appropriate heterosexual skills. These goals are pursued through 4 programs which are offered separately to patients who require the relevant treatment.

The Problem Identification group program identifies specific problems and helps the patient to explain his offence history in a realistic and constructive manner. The Sex Education program teaches factual knowledge and value related material in a didactic format. The Heterosocial Skills program teaches appropriate social behaviors involved in initiating and maintaining relationships with women using modeling, practice in role playing situations, videotape feedback and coaching. The Sexual Behavior Laboratory offers a variety of techniques (biofeedback, signaled punishment, olfactory aversion, and masturbatory satiation) to teach patients to control their inappropriate sexual arousal.

Other forms of treatment are sometimes relevant: often patients have problems which are more or less unrelated to their sexual offending but which, nevertheless, require treatment. Some forms of treatment, for example, life skills or vocational training may be expected to have beneficial but more indirect effects.

Occasionally, provera may be an appropriate form of treatment but this is very rare within Oak Ridge. Provera is more useful in the community when the aim is to reduce the amount of inappropriate fantasy and frequency of sexual urges. One difficulty with provera is that it works only when it is being administered. In addition, it has no effect on sexual preferences.

Compliance is a frequent problem in the community. Provera is, however, useful for persons who are hypersexual. Hypersexuality is defined in terms of intrusive sexual rumination, not in terms of testosterone level. In this connection, it should be noted that a high testosterone level is not related to sexual offending, although there is weak and preliminary evidence that it may be related to the amount of aggression in sexual offending.

Conclusions

A large number of variables must be weighed and combined in arriving at a decision about the release of sexual offenders. The most important of these is the number and severity of previous offences. Next most important is the presence of inappropriate sexual fantasies. A variety of other factors which are of less importance must be weighed in arriving at a decision about an individual offender. In no case, however, can a decision to release or retain be made with a high degree of confidence.

Further Reading

a) General reviews

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b) Treatment of sex offenders

Abel, G.G., Blanchard, E.B., & Becker, J.V. Psychological treatment of rapists. In M.J. Walker and S.L. Brodsky (Eds.) *The sexual aggressor: Current perspectives on treatment.* Toronto: Lexington Books, 1976.

Kelly, R.J. Behavioral reorientation of pedophilias: Can it be done? *Clinical Psychology Review,* 1982, *2,* 387-408.

Maletzky, B.M. Self-referred vs. court-referred sexually deviant patients: Success with assisted covert sensitization *Behavior Therapy,* 1980, *11,* 306-314.

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Quinsey, V.L. & Marshall, W.L. Procedures for reducing inappropriate sexual arousal: An evaluation review. In J.G. Greer and J.R. Stuart (Eds.) The sexual aggressor: *Current perspectives on treatment.* New York: Van Nostrand Reinhold, 1983.

Appendix I

Excerpts from the Criminal Code of Canada being Sections 542 to 547.

Defence of Insanity

Insanity of accused when offence committed — Custody after finding.

542. (1) Where, upon the trial of an accused who is charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted,

(a) the jury, or

(b) the judge or magistrate, where there is no jury,

shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity.

(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial was held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known. 1953-54, c. 51, s. 523.

Insanity at time of trial — Direction or remand for observation — Idem — Court shall assign counsel — Trial of issue — If sane, trial proceeds — If insane, order for custody — Where accused acquitted — Subsequent trial.

543. (1) A court, judge or magistrate may, at any time before verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand his trial.

(2) A court, judge or magistrate may, at any time before verdict or sentence, when of the opinion, supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified medical practitioner, that there is reason to believe that:

(a) an accused is mentally ill, or

(b) the balance of the mind of an accused is disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child,

by order in writing

(c) direct the accused to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or

(d) remand the accused to such custody as the court, judge or magistrate directs for observation for a period not exceeding thirty days.

(2.1) Notwithstanding subsection (2), a court, judge or magistrate may remand an accused in accordance with that subsection

(a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practioner is not readily available to examine the accused and give evidence or submit a report; and

(b) for a period of more than thirty days but not exceeding sixty days where he is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence or, where the prosecutor and the accused consent, by the report in writing, of at least one duly qualified practitioner.

(3) Where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the court, judge or magistrate shall, if the accused is not represented by counsel, assign counsel to act on behalf of the accused.

(4) For the purposes of subsection (1), the following provisions apply, namely,

(a) where the issue arises before the close of the case of the prosecution, the court, judge or magistrate may postpone directing the trial of the issue until any time up to the opening of the case for the defence;

(b) where the trial is held or is to be held before a court composed of a judge and jury,

(i) if the judge directs the issue to be tried before the accused is given in charge to a jury for trial on the indictment, it shall be tried by twelve jurors, or in the Yukon Territory and the Northwest Territories, by six jurors, and

(ii) if the judge directs the issue to be tried after the accused has been given in charge to a jury for trial on the indictment, the jury shall be

sworn to try that issue in addition to the issue on which they are already sworn; and

(c) where the trial is held before a judge or magistrate, he shall try the issue and render a verdict.

(5) Where the verdict is that the accused is not unfit on account of insanity to stand his trial, the arraignment or the trial shall proceed as if no such issue had been directed.

(6) Where the verdict is that the accused is unfit on account of insanity to stand his trial, the court, judge or magistrate shall order that the accused be kept in custody until the pleasure of the lieutenant governor of the province is known, and any plea that has been pleaded shall be set aside and the jury shall be discharged.

(7) Where the court, judge or magistrate has postponed directing the trial of the issue pursuant to paragraph (4)*(a)* and the accused is acquitted at the close of the case for the prosecution, the issue shall not be tried.

(8) No proceeding pursuant to this section shall prevent the accused from being tried subsequently on the indictment unless the trial of the issue was postponed pursuant to paragraph (4)*(a)* and the accused was acquitted at the close of the case for the prosecution. R.S., c. C-34, s. 543; 1972, c. 13, s. 44; 1974–75–76, c. 93, s. 68.

Insanity of accused to be discharged for want of prosecution.

544. Where an accused who is charged with an indictable offence is brought before a court, judge or magistrate to be discharged for want of prosecution and the accused appears to be insane, the court, judge or magistrate shall proceed in accordance with section 543 in so far as that section may be applied. 1953-54, c. 51, s. 525.

Supervision of insane persons — Warrant for transfer — Transfer of accused — Arrest of accused — Taking before a justice — Order of justice.

545. (1) Where an accused is, pursuant to this Part, found to be insane, the lieutenant governor of the province in which he is detained may make an order

(a) for the safe custody of the accused in a place and manner directed by him, or

(b) if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribes.

(2) An accused to whom paragraph (1)*(a)* applies may, by warrant signed by an officer authorized for that purpose by the lieutenant governor of the

province in which he is detained, be transferred for the purpose of his rehabilitation to any other place in Canada specified in the warrant with the consent of the person in charge of such place.

(3) A warrant mentioned in subsection (2) is sufficient authority for any person who has custody of the accused to deliver the accused to the person in charge of the place specified in the warrant and for such last mentioned person to detain the accused in the manner specified in the order mentioned in subsection (1).

(4) A peace officer who has reasonable and probable grounds to believe that an accused to whom paragraph (1)*(b)* applies has violated any condition prescribed in the order for his discharge may arrest the accused without warrant.

(5) Where an accused has been arrested pursuant to subsection (4), he shall be dealt with in accordance with the following provisions:

(a) where a justice having jurisdiction in the territorial division in which the accused has been arrested is available within a period of twenty-four hours after the arrest of the accused by a peace officer, the accused shall be taken before a justice without unreasonable delay and in any event within that period; and

(b) where a justice having jurisdiction in the territorial division in which the accused has been arrested is not available within a period of twenty-four hours after the arrest of the accused by a peace officer, the accused shall be taken before a justice as soon as possible.

(6) A justice before whom an accused is taken pursuant to subsection (5) may make any order that to him seems desirable in the circumstances respecting the detention of the accused pending a decision of the lieutenant governor of the province referred to in subsection (1) and shall cause notice of such order to be given to that lieutenant governor. R.S., c. C-34, s. 545; 1972, c. 13, s. 45; 1974-75-76, c. 93, s. 69.

Prisoner mentally ill — Custody in safe-keeping — Order for imprisonment or discharge — Order for transfer to custody of minister of health — "Prison".

546. (1) The lieutenant governor of a province may, upon evidence satisfactory to him that a person who is insane, mentally ill, mentally deficient or feeble-minded is serving a sentence in a prison in that province, order that the person be removed to a place of safe-keeping to be named in the order.

(2) A person who is removed to a place of safe-keeping under an order made pursuant to subsection (1) shall, subject to subsection (3) and (4), be

kept in that place or in any other place of safe-keeping in which, from time to time, he may be ordered by the lieutenant governor to be kept.

(3) Where the lieutenant governor is satisfied that a person to whom subsection (2) applies has recovered, he may order that the person

(a) be returned to the prison from which he was removed pursuant to subsection (1), if he is liable to further custody in prison, or

(b) be discharged, if he is not liable to further custody in prison.

(4) Where the lieutenant governor is satisfied that a person to whom subsection (2) applies has partially recovered, he may, where the person is not liable to further custody in prison, order that the person shall be subject to the direction of the minister of health for the province, or such other person as the lieutenant governor may designate, and the minister of health or other person designated may make any order or direction in respect of the custody and care of the person that he considers proper.

(5) In this section, "prison" means a prison other than a penitentiary, and includes a reformatory school or industrial school. R.S., c. C-34, s. 546; 1974-75-76, c. 93, s. 70.

Appointment of board of review — Constitution of board — Idem — Quorum — Periodic review and report to be made on case of each person in custody — Review and report to be made when requested by lieutenant governor — Powers.

547. (1) The lieutenant governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2).

(2) The board referred to in subsection (1) shall consist of not less than three and not more than five members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by the lieutenant governor.

(3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which the board is appointed, and at least one member of the board shall be a member of the bar of the province.

(4) Three members of the board of review, at least one of whom is a psychiatrist described in subsection (3) and one of whom is a member of the bar of the province, constitute a quorum of the board.

(5) The board shall review the case of every person referred to in subsection (1)

(a) not later than six months after the making of the order referred to in that subsection relating to that person, and

(b) at least once in every twelve month period following the review required pursuant to paragraph *(a)* so long as the person remains in custody under the order,

and forthwith after each review the board shall report to the lieutenant governor setting out fully the results of such review and stating

(c) where the person in custody was found unfit on account of insanity to stand his trial, whether, in the opinion of the board, that person has recovered sufficiently to stand his trial,

(d) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person has recovered and, if so, whether in its opinion it is in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe,

(e) where the person in custody was removed from a prison pursuant to subsection 546(1), whether, in the opinion of the board, that person has recovered or partially recovered, or

(f) any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest.

(6) In addition to any review required to be made under subsection (5), the board shall review any case referred to in subsection (1) when requested to do so by the lieutenant governor and shall forthwith after such review report to the lieutenant governor in accordance with subsection (5).

(7) For the purposes of a review under this section, the chairman of a board has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on commissioners appointed under Part I of that Act. R.S., c. C-34, s. 547; 1974-75-76, c. 93, s. 71.

Appendix J

REGINA v. SAXELL

Ontario Court of Appeal, Jessup, Martin and Weatherston JJ.A.
September 25, 1980.

Civil rights — Arbitrary detention or imprisonment — Criminal Code providing that accused acquitted on account of insanity to be ordered held in custody until pleasure of Lieutenant-Governor known — Legislation then providing for accused's immediate discharge by Lieutenant-Governor or for periodic review — Whether provision inoperative by reason of Bill of Rights guarantee of protection against arbitrary detention or imprisonment — Cr. Code, ss. 542, 545, 547 — Canadian Bill of Rights, s. 2(a).

Civil rights — Due process — Detention on account of insanity — Criminal Code providing that accused acquitted on account of insanity to be ordered held in custody until pleasure of Lieutenant-Governor known — Legislation then providing for accused's immediate discharge by Lieutenant-Governor or for periodic review — Whether provision inoperative by reason of Bill of Rights guarantee of due process — Whether separate judicial hearing required prior to detention — Cr. Code, ss. 542, 545, 547 — Canadian Bill of Rights, s. 1(a).

Civil rights — Cruel and unusual punishment — Criminal Code providing that accused acquitted on account of insanity to be ordered held in custody until pleasure of Lieutenant-Governor known — Legislation then providing for accused's immediate discharge by Lieutenant-Governor or for periodic review — Whether provision inoperative by reason of Bill of Rights guarantee of protection against cruel and unusual punishment where finding of insanity based on evidence led by Crown and where defence of insanity opposed by accused — Cr. Code, ss. 542, 545, 547 — Canadian Bill of Rights, s. 2(b).

Civil rights — Equality before the law — Detention on account of insanity — Criminal Code providing that accused acquitted on account of insanity to be ordered held in custody until pleasure of Lieutenant-Governor known — Legislation then providing for accused's immediate discharge by Lieutenant-Governor or for periodic review — Whether provision inoperative by reason of Bill of Rights guarantee of equality before the law — Cr. Code, ss. 542, 545, 547 — Canadian Bill of Rights, s. 1(b).

Section 542(2) of the *Criminal Code*, which is part of the legislative scheme dealing with an accused found not guilty by reason of insanity, and which provides that where the accused is found insane at the time the offence was committed the Court, Judge or Magistrate "shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the

pleasure of the lieutenant governor of the province is known", is not inoperative by reason of the *Canadian Bill of Rights* guarantees of equality before the law under s. 1(*b*), due process under s. 1(*a*), protection against arbitrary detention and imprisonment under s. 2(*a*) or cruel and unusual punishment under s. 2(*b*). The legislative scheme established by Parliament is that when an order is made under s. 542(2) the Lieutenant-Governor is first required to form an opinion whether the condition of the accused is such that it would be in his best interest, and not contrary to the interest of the public, for his immediate discharge either absolutely or conditionally. Then if he does make an order for the safe custody of the accused, the Advisory Review Board appointed by the Lieutenant-Governor is required to review the case within six months and thereafter at least once every 12 months.

Such a scheme does not abrogate, abridge or infringe the right to equality before the law. It is open to Parliament to legislate so as to affect one class of persons differently than others where the inequality has been created for a valid federal objective. There is an underlying assumption that persons found not guilty by reason of insanity may remain a danger to the public, and society is justified in subjecting those persons to further diagnosis and assessment in exercising appropriate control over them and, if necessary, in providing them with suitable medical treatment, although in the result such persons are dealt with differently than persons who are acquitted absolutely. The fact that in certain cases the underlying assumption is not valid does not mean that the legislation offends the right of equality before the law within the meaning of s. 1(*b*). Nor does it authorize or effect arbitrary detention or imprisonment within the meaning of s. 2(*a*). There is no evidence that persons continue to be held in custody after they have ceased to be a danger. Further, the guarantee of due process of law under s. 1(*a*) does not require a separate judicial hearing before a person may be kept in custody after being acquitted on account of insanity. Finally, the provisions do not result in cruel and unusual punishment even where the finding of insanity is based on evidence led by the Crown in circumstances where the accused does not advance the defence of insanity. The detention of the accused in these circumstances is not punishment at all, but is for the protection of the public and treatment of the accused.

[*MacKay v. The Queen* (1980), 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393, [1980] 2 S.C.R. 370, [1980] 5 W.W.R. 385, 33 N.R. 1, apld; *Prata v. Minister of Manpower and Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 484; affg 31 D.L.R. (3d) 465, [1972] F.C. 1405, consd; *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519, [1972] 3 O.R. 783; *R. v. Drybones*, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473, [1970] S.C.R. 282, 10 C.R.N.S. 334, 71 W.W.R. 161; *Curr v. The Queen* (1972), 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603, [1972] S.C.R. 889, 18 C.R.N.S. 281; *Bliss v. A-G. Can.* (1978), 92 D.L.R. (3d) 417, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 23 N.R. 527; *R. v. Burnshine* (1974), 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584, [1975] 1 S.C.R. 693, 25 C.R.N.S. 270, [1974] 4 W.W.R. 49; *Welsh v. The King* (1950), 97 C.C.C. 177, [1950] 3 D.L.R. 641, [1950] S.C.R. 412, 10 C.R. 97; *The Queen v. The Bishop of Oxford* (1879), 4 Q.B.D. 245; *Brookshaw v. Hopkins* (1773), Lofft 235, 240, 98 E.R. 627; *R. v. Martin* (1854), 2 N.S.R. 322; *Smythe v. The Queen* (1970), 3 C.C.C. (2d) at p. 98, 17 D.L.R. (3d) at p. 390, [1971] 2 O.R. at p. 210; affd 3 C.C.C. (2d) 97, 17 D.L.R. (3d) 389, [1971] 2 O.R. 209; affd 3 C.C.C. (2d) 366, 19 D.L.R. (3d) 480, [1971] S.C.R. 680, refd to]

Defences — Insanity — Raising of issue by Crown — Circumstances in which evidence of insanity may be adduced by Crown where defence not raised by accused — Whether trial Judge has discretion to prevent Crown from introducing evidence.

Where the defence of insanity is not raised by the accused, the Crown may adduce evidence of insanity only with leave of the trial Judge, who may first require that a *voir dire* be held. The overriding consideration is that the interest of justice demands that the accused should not be convicted of the offence charged. There must be convincing evidence that the accused has committed the act alleged. The evidence of insanity must be sufficiently substantial, and create such a grave question whether the accused had the capacity to commit the offence that the interests of justice require it to be adduced. Further, in exercising his discretion whether to permit the Crown to adduce evidence of the insanity of the accused, the Judge ought to have regard to the nature and seriousness of the offence alleged to have been committed and the extent to which the accused may be a danger to the public.

[*R. v. Simpson* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507, 16 O.R. (2d) 129, consd; *Cooper v. The Queen* (1980), 51 C.C.C. (2d) 129, 110 D.L.R. (3d) 46, [1980] 1 S.C.R. 1149, 13 C.R. (3d) 97, 31 N.R. 234, refd to]

APPEAL by the accused from the finding of not guilty by reason of insanity on a charge of possession of a weapon for a purpose dangerous to the public peace.

C. C. Ruby, for accused, appellant.
H. J. Campbell, for the Crown, respondent.
A. D. Gold, for intervenant, Canadian Civil Liberties Association.

The judgment of the Court was delivered by

WEATHERSTON J.A.:—At trial of the appellant on a charge of having in his possession a weapon, to wit: a knife, for a purpose dangerous to the public peace, the Crown adduced evidence of his insanity, and after a trial over a lengthy period of time, Provincial Judge K. A. Langdon found that the appellant was insane at the time of the alleged offence, and declared that he was acquitted on account of insanity. Judge Langdon refused to make an order that the appellant be kept in strict custody until the pleasure of the Lieutenant-Governor was known, holding that s. 542(2) of the *Criminal Code*, which requires that order to be made, was contrary to the *Canadian Bill of Rights*.

At the conclusion of argument, the appeal was allowed and a new trial ordered for reasons that were then given orally, but the Court directed that if the Court at the new trial should find that the appellant was not guilty on account of insanity, an order under s. 542(2) must be made, and stated that written reasons for that direction would be delivered later. Those reasons now follow.

The trial Judge's finding that s. 542(2) of the *Criminal Code* is contrary to the *Canadian Bill of Rights* because it requires the automatic detention of the accused for an indefinite period of time

was supported by counsel for the appellant and for the Canadian Civil Liberties Association on four grounds:

1. It violates the right of the individual to equality before the law and the protection of the law contrary to s. 1(*b*). Parliament had no valid legislative purpose in singling out for special treatment persons acquitted on account of insanity; not all such persons are dangerous. Further, having been acquitted, they should not be treated differently from persons suffering the same mental disorder who have not been charged with a criminal offence.
2. It authorizes or effects the arbitrary detention and imprisonment of such an acquitted person contrary to s. 2(*a*). It is arbitrary because of a lack of sufficient cause for the detention in the mere fact of having been charged and acquitted. In that sense, the indefinite detention under the *Criminal Code* is "capricious; unreasonable; unsupported . . .". Reference was made to *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182 at p. 189, 29 D.L.R. (3d) 519, [1972] 3 O.R. 783 (Ont. C.A.).
3. It imposes or authorizes the imposition of cruel and unusual treatment or punishment contrary to s. 2(*b*) in that indefinite confinement is imposed on an accused who has been acquitted of any offence, and under conditions more harsh than those suffered by an insane person confined under the civil process. It is unusual in that no other category of acquitted person is so treated. Moreover, all persons acquitted on account of insanity are treated in the same way, whether or not they are dangerous, and regardless of the nature of the act they have committed.
4. It violates the right of the individual to due process of the law guaranteed by s. 1(*a*). The accused has been acquitted of any criminal offence, but is nevertheless deprived of his liberty on the arbitrary assumption that he is dangerous. Such an assumption should not be made but, rather, due process requires a separate hearing, with the right to counsel to cross-examine and to call witnesses, in order to assess the degree of dangerousness of the accused at the time of trial and his need for compulsory hospitalization.

Sections 1 and 2 of the *Canadian Bill of Rights* are as follows:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(*b*) the right of the individual to equality before the law and the protection of the law;

(*c*) freedom of religion;

(*d*) freedom of speech;

(*e*) freedom of assembly and association; and

(*f*) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill or Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Some general propositions may be stated. A law of Canada will not be held to abrogate, abridge or infringe on the rights and freedoms recognized and declared by the *Canadian Bill of Rights* if it can be sensibly construed and applied so as not to have that effect. But if it does have that effect, it will be held to be inoper-

ative to the extent to which it does not conform: *R. v. Drybones*, [1970] 3 C.C.C. 355, 9 D.L.R. (3d) 473, [1970] S.C.R. 282. Section 2 gives operative effect to the human rights and fundamental freedoms specified in s. 1, as well as to the additional protections listed in s. 2: *Curr v. The Queen* (1972), 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603, [1972] S.C.R. 889. The fundamental constitutional concept that Parliament is supreme will not be ignored, and compelling reasons ought to be advanced to justify the Court to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with tenets of responsible Government, which underlie the discharge of legislative authority under the *British North America Act, 1867*. The very large words of s. 1 signal extreme caution where the Court is asked to apply them in negation of substantive legislation validly enacted by a Parliament in which the major role is played by elected representatives of the people: *Curr v. The Queen*, *supra*, at pp. 191-4 C.C.C., pp. 899-902 S.C.R.: *Bliss v. A.-G. Can.* (1978), 92 D.L.R. (3d) 417, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711. The right of the individual to equality before the law does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective. *R. v. Burnshine* (1974), 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584, [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration* (1975), 52 D.L.R. (3d) 383, [1976] 1 S.C.R. 376, 3 N.R. 484.

Section 542(2) of the *Code* must be considered, as to its conformity with the *Canadian Bill of Rights*, in the context of the entire scheme that Parliament has devised for accused persons who have been acquitted on account of insanity. The applicable sections of the *Code* are:

> 542(1) Where, upon the trial of an accused who is charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted,
>
> (*a*) the jury, or
>
> (*b*) the judge or magistrate, where there is no jury,
>
> shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity.
>
> (2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the lieutenant governor of the province is known.
>
> . . . . .

545(1) Where an accused is, pursuant to this Part, found to be insane, the lieutenant governor of the province in which he is detained may make an order:

(*a*) for the safe custody of the accused in a place and manner directed by him, or

(*b*) if in his opinion it would be in the best interest of the accused and not contrary to the interest of the public, for the discharge of the accused either absolutely or subject to such conditions as he prescribes. [rep. & sub. 1972, c. 13, s. 45]

(2) An accused to whom paragraph (1)(*a*) applies may, by warrant signed by an officer authorized for that purpose by the lieutenant governor of the province in which he is detained, be transferred for the purposes of his rehabilitation to any other place in Canada specified in the warrant with the consent of the person in charge of such place.

(3) A warrant mentioned in subsection (2) is sufficient authority for any person who has custody of the accused to deliver the accused to the person in charge of the place specified in the warrant and for such last mentioned person to detain the accused in the manner specified in the order mentioned in subsection (1). [enacted 1974-75-76, c. 93, s. 70]

. . . . .

547(1) The lieutenant governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2).

(2) The board referred to in subsection (1) shall consist of not less than three and not more than five members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by lieutenant governor.

(3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which the board is appointed, and at least one member of the board shall be a member of the bar of the province.

(4) Three members of the board of review, at least one of whom is a psychiatrist described in subsection (3) and one of whom is a member of the bar of the province, constitute a quorum of the board.

(5) The board shall review the case of every person referred to in subsection (1)

(*a*) not later than six months after the making of the order referred to in that subsection relating to that person, and

(*b*) at least once in every twelve month period following the review required pursuant to paragraph (*a*) so long as the person remains in custody under the order,

and forthwith after each review the board shall report to the lieutenant governor setting out fully the results of such review and stating

(*c*) where the person in custody was found unfit on account of insanity to stand his trial, whether, in the opinion of the board, that person has recovered sufficiently to stand his trial,

(*d*) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person has recovered and, if so, whether in its opnion it is in the interest of the public and of that person for the lieutenant governor to order that

he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe,

(*e*) where the person in custody was removed from a prison pursuant to subsection 546(1), whether, in the opinion of the board, that person has recovered or partially recovered, or

(*f*) any recommendations that it considers desirable in the interest of recovery of the person to whom such review relates and that are not contrary to the public interest.

(6) In addition to any review required to be made under subsection (5), the board shall review any case referred to in subsection (1) when requested to do so by the lieutenant governor and shall forthwith after such review report to the lieutenant governor in accordance with subsection (5).

(7) For the purposes of a review under this section, the chairman of a board has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on commissioners appointed under Part I of that Act. [am. 1974-75-76, c. 93, s. 71]

Both ss. 545(1) and 547(1) use the word "may" which is normally construed as permissive. But that is not always the case. In *Welch v. The King* (1950), 97 C.C.C. 177 at pp. 189-90, [1950] 3 D.L.R. 641, [1950] S.C.R. 412 at p. 426, Fauteux J. quoted the following passage from *The Queen v. Bishop of Oxford* (1879), 4 Q.B.D. 245 at p. 258:

> "So long ago as the year 1693 it was decided in the case of *The King v. Barlow*, Salk 609, that when a statute authorizes the doing a thing for the sake of justice or the public good, the word 'may' means 'shall' and that rule has been acted upon to the present time."

At common law, an accused was acquitted if he was found to have been insane when he committed the alleged crime. It is not clear whether he was entitled to be set free, or whether the trial Judge was competent to direct his confinement: see Nigel Walker, *Crime and Insanity in England*, vol. 1 (1967), pp. 42 and 81. Whatever the power of the trial Judge in those cases, it is clear that the Crown, as a prerogative right or duty, was entitled to the custody of all insane persons for their own protection or for the protection of the community: *Encyclopedia of the laws of England*, vol. 8 (1897), p. 54; *Brookshaw v. Hopkins* (1773), Lofft 235, 240, 98 E.R. 627 (K.B.); *R. v. Martin* (1854), 2 N.S.R. 322 at p. 325, *per* Haliburton in the absence of the above-quoted sections of the *Code*, the right to the custody of an accused person who has been acquitted on account of insanity would, I assume, vest in the Lieutenant-Governor. That right has now been assumed by Parliament in criminal cases, and by it delegated to the Lieutenant-Governor, so that he derives his authority from the *Code* and not from any vestige of the Royal Prerogative. It would be unseemly for Parliament to use imperative language when conferring power on a representative of the Sovereign, but I think

a duty is nevertheless cast upon the Lieutenant-Governor to make one or other of the orders contemplated by s. 545(1), that is, either for the safe custody of the accused, *or* for his immediate discharge, thus bringing to an end the order made by the trial Judge under s. 542(2).

The learned trial Judge in his reasons and counsel in argument on this appeal spoke of "arbitrary detention" and "indefinite confinement under conditions more harsh than those suffered by an insane person confined under the civil process". There is no evidence before the Court to justify the use of those epithets; nor is there evidence that persons continue to be held in custody after they have ceased to be a danger to the public. Section 547 of the *Code* was first enacted by Parliament in 1969, although it has since been amended. Section 545(1)(*b*) of the *Code* would appear to have been enacted in response to the Report of the Canadian Committee on Corrections in 1969, (the "Ouimet Report"), which also recommended that review boards be established. At p. 231 of the report, the committee said:

> When one thinks of custody pursuant to an order of the lieutenant-governor, the mind may automatically focus upon the need for a maximum security setting as the place of detention. While it may be true that the criminal charge involved in the majority of cases of those acquitted on account of insanity or found unfit to stand trial is classified as a serious one, this is not always the case. Lesser, and what many would feel are minor charges representing no danger have and may be involved. Accordingly, custody awaiting the pleasure of the lieutenant-governor should not always evoke further detention of a maximum security nature. Indeed, our Committee can envisage instances where it is secure and desirable for the lieutenant-governor to issue his initial order, not for further custody, but for discharge from custody. We believe that appropriate measures should be taken in each province to screen those who await the pleasure of the lieutenant-governor in the first instance, to determine what will be a proper disposition in each case on its individual merits. Flexibility of disposition is essential.

and, at p. 232 of the report:

> Although there is a common belief that lieutenant-governor's warrant custody means detention for life, this no longer holds true. Persons have been and are being discharged and returned for trial throughout the country. However, there is a need for greater checks and balances than now exist in most provinces. Unlike the situation with non-criminally involved mental patients, hospital authorities are not in a position legally to dictate when a lieutenant-governor's warrant patient leaves hospital. The need is clear for properly constituted review boards with appropriate safeguards built into their procedural functions.

Even before that date, the Ontario Legislature had enacted the following sections of the *Mental Health Act*, R.S.O. 1970, c. 269:

> 29(1) Upon receipt of an application by the chairman, the review board shall conduct such inquiry as it considers necessary to reach a decision and may hold a hearing, which in the discretion of the review board may be *in camera*, for the purpose of receiving oral testimony.

(2) Where a hearing is held, the patient may attend the hearing unless otherwise directed by the chairman and, where he does not attend, he may have a person appear as his representative.

(3) Where a hearing is held, the patient or his representative may call witnesses and make submissions and, with the permission of the chairman, may cross-examine witnesses.

(4) The officer in charge shall, for the purpose of an inquiry, furnish the chairman with such information and reports as the chairman requests.

(5) The review board or any member thereof may interview a patient or other person in private.

. . . . .

31(1) The Lieutenant Governor in Council may appoint an advisory review board for any one or more psychiatric facilities that has a review board.

(2) An advisory review board shall be composed of a judge or a retired judge of the Supreme Court who shall serve as chairman, a psychiatrist and any three members who constitute a quorum of the review board.

(3) Subsections 4, 5 and 6 of section 27 apply *mutatis mutandis* to the members of an advisory review board.

(4) The five members of an advisory review board constitute a quorum and the recommendation of a four-fifths majority is the recommendation of the advisory review board.

(5) The case of every patient in a psychiatric facility who is detained under the authority of a warrant of the Lieutenant Governor under the *Criminal Code* (Canada) shall be considered by the advisory review board having jurisdiction once in every year, commencing with the year next after the year in which the warrant was issued.

(6) Notwithstanding subsection 5, the advisory review board shall consider the case of any patient to which that subsection applies at any time upon the written request of the Minister.

(7) Section 29 applies *mutatis mutandis* to cases under this section.

(8) Upon the conclusion of an inquiry, the chairman shall prepare a written report of the recommendations of the advisory review board and, within the time prescribed by the regulations, shall transmit a copy thereof to the Lieutenant Governor in Council, and may in his discretion transmit a copy thereof to any other person.

Although the provisions of s. 31 as to the composition of the Advisory Review Board are not identical with those of s. 547 of the *Code*, the fact is that the Board, as presently composed, conforms with, and exercises jurisdiction under both sections. It is a fine example of co-operative federalism.

The legislative scheme established by Parliament is, therefore, that when a Judge's order has been made under s. 542(2), the Lieutenant-Governor is first required to form an opinion whether the present condition of the accused is such that it would be in his best interest, and not contrary to the interest of the public, for his immediate discharge either absolutely or conditionally. Then, if he does make an order for the safe custody of the accused, the Advisory Review Board is required to review the case within six

months and, thereafter, at least once in every 12-month period and in addition, when requested to do so by the Lieutenant-Governor. Section 29 of the *Mental Health Act* is applicable to any such review. Thus, the fate of an accused who has been acquitted on account of insanity is removed from the judicial process, and entrusted to the Lieutenant-Governor under a code of procedure that ensures review at reasonable intervals of time by experts in the field of mental health.

Does this scheme abrogate, abridge or infringe on the right to equality before the law? I think not. True, accused persons acquitted on account of insanity are not treated in the same way as other acquitted persons or in the same way as other insane persons who have not been charged with an offence; in addition all accused persons, regardless of the nature of the acts they have committed, are subject to the same type of order.

But these provisions of the *Code* are not designed to punish the accused; they are for the protection of the public and the treatment of the accused. Manifestly, the public is best protected by the cure of the accused. Indeed, the original statute from which ss. 542 and 545 were derived recited that "it may be dangerous to permit persons so acquitted to go at large . . .": the *Criminal Lunatics Act*, 1800 (U.K.), c. 94.

Surely, Parliament had a valid federal objective in enacting ss. 542, 545 and 547 of the *Code*. In *R. v. Burnshine*, *supra*, at pp. 510-1 C.C.C., p. 701 S.C.R., Martland J., for the majority of the Court, quoted with approval the following passage from the judgment of Jackett C. J. in *Re Prata and Minister of Manpower and Immigration* (1972), 31 D.L.R. (3d) 465 at p. 473, [1972] F.C. 1405:

> "It is a novel thought to me that it is inconsistent with the concept of 'equality before the law' for Parliament to make a law that, for sound reasons of legislative policy, applies to one class of persons and not to another class. As it seems to me, it is of the essence of sound legislation that laws be so tailored as to be applicable to such classes of persons and in such circumstances as are best calculated to achieve the social, economic or other national objectives that have been adopted by Parliament."

And in *MacKay v. The Queen* (1980), 54 C.C.C. (2d) 129 at pp. 158-9, 114 D.L.R. (3d) 393, [1980] 2 S.C.R. 370, Supreme Court of Canada, July 18, 1980, McIntyre J., speaking for himself and Dickson J., said:

> It seems to me that it is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to the *Canadian Bill of Rights*. The problem arises however when we attempt to determine an acceptable basis for the definition of such a separate class, and the nature of the special legislation involved. Equality in this context must not be synonymous with mere universality of application. There are many differing circumstances and

conditions affecting different groups which will dictate different treatment. The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.

There are many such acceptable distinctions recognized in the law. If we are to have safety on the highways, the blind or those with deficient sight must be forbidden to drive. If young people and children are to be protected and their welfare fostered in youth, we have long recognized that special legislative provisions must be made for them imposing restrictions and limitations upon their freedom more stringent than upon adults. In matters of criminology, differences which have been considered conducive to the welfare of society and to young offenders have been considered permissible (see *R. v. Burnshine*, *supra*). There are many such cases where the needs of society and the welfare of its members dictate inequality for the achievement of socially desirable purposes. It would be difficult, if not impossible, to propound an all embracing test to determine what departures from the general principle of equal application of law would be acceptable to meet a desirable social purpose without offence to the *Canadian Bill of Rights*. I would be of the opinion, however, that as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the *Canadian Bill of Rights*, and whether it is necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective. Inequalities created for such purposes may well be acceptable under the *Canadian Bill of Rights*.

Society has a legitimate social interest in persons who have committed some serious social harm, but who have been found not to be criminally responsible on account of mental disorder; it is justified in subjecting those persons to further diagnosis and assessment, in exercising appropriate control over them, if necessary, and in providing them with suitable medical treatment. There is an underlying assumption that they may remain a danger to the public because they have, in fact, committed some act which would have been a criminal act had they not been insane when the act was committed. It may well be that in individual cases that underlying assumption is not valid, but that does not mean that the legislative scheme, in itself, offends the right of equality before the law or authorizes or effects arbitrary detention or imprisonment. Parliament must necessarily paint with a broad brush. It is within the test proposed by McIntyre J. to distinguish, on these grounds, between persons who have been truly acquitted and those who have been acquitted on account of insanity.

Mr. Gold cited many American cases to the effect that there was a denial of due process of law unless there was a separate judicial hearing, with all the usual safeguards of an adversary proceeding, before a person could be kept in custody after having been acquitted on account of insanity. American cases are of limited use in the interpretation of the *Canadian Bill of Rights*. Not only does the phrase "due process of law" bear a different meaning in Canada from that which it bears in the United States, but the two systems of Government are so different as to make the reasoning in the American cases inappropriate to Canada: see *Curr v. The Queen* (1972), 7 C.C.C. (2d) 181 at pp. 189-91, 26 D.L.R. (3d) 603, [1972] S.C.R. 889 at pp. 897-8; *Smythe v. The Queen* (1970), 3 C.C.C. (2d) at p. 98, 17 D.L.R. (3d) at p. 390, [1971] 2 O.R. at p. 210, *per* Wells C.J.H.C.; affirmed 3 C.C.C. (2d) 97 at pp. 112-3, 17 D.L.R. (3d) 389, [1971] 2 O.R. 209 at p. 225; affirmed 3 C.C.C. (2d) 366 at pp. 371-2, 19 D.L.R. (3d) 480, [1971] S.C.R. 680 at p. 687; (1972), 9 C.C.C. (2d) 182, 29 D.L.R. (3d) 519, [1972] 3 O.R. 783 at p. 787.

In the present case the prosecution advanced evidence of the appellant's insanity. Mr. Ruby argued that in the circumstances of this case that procedure resulted in cruel and unusual punishment in that the appellant was denied his right to accept the risk of a short prison sentence, but instead was made liable to a term of indefinite detention. I have already said that detention of the accused is not punishment at all, but is for the protection of the public and the treatment of the accused.

It is true that the defence usually raises a plea of insanity only in the most serious cases, but even though the defence is not raised and the prosecution does not tender evidence, there may be sufficient evidence before the Court that the trial Judge is required to instruct the jury on that issue. That was the case in *Cooper v. The Queen* (1980), 51 C.C.C. (2d) 129, 110 D.L.R. (3d) 46, [1980] 1 S.C.R. 1149 (S.C.C.).

The prosecution in this case relied on *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507, 16 O.R. (2d) 129 (Ont. C.A.). That case has been misunderstood if it is thought to be authority for the proposition that the prosecution may adduce evidence of the insanity of the accused in any case. Martin J.A. makes it perfectly clear that such evidence may be adduced only with the leave of the presiding Judge, who might first see fit to hold a *voir dire*. The overriding consideration is that the interest of justice demands that the accused should not be convicted of the offence charged. There must be convincing evidence that the accused has

committed the act alleged. Manifestly, it would be wrong if evidence of insanity were to influence the jury's decision on that issue, either by affecting his credibility in case he testified, or by leading to the conclusion that the accused was the sort of person likely to have committed the act.

The evidence of insanity at the time of commission of the act must be sufficiently substantial, and create such a grave question whether the accused had the capacity to commit the offence, that the interests of justice require it to be adduced.

Although not expressly so stated in the reasons for judgment in *R. v. Simpson*, *supra*, I consider that in exercising his discretion whether to permit the Crown to adduce evidence of the insanity of the accused, the Judge ought to have regard to the nature and seriousness of the offence alleged to have been committed and the extent to which the accused may be a danger to the public.

If the trial Judge exercises his discretion on the basis of these considerations, then the public interest outweighs any right the accused may have not to raise the defence of insanity.

It is my opinion that s. 542(2) of the *Code*, in the context of the legislative scheme set out in ss. 545 and 547, does not offend the *Canadian Bill of Rights*. It does not authorize the abrogation, abridgment or infringement of the right to equality before the law, or to due process of law; it does not authorize or effect the arbitrary detention of any person; nor does it authorize the imposition of cruel and unusual treatment or punishment.

It was for these reasons that the direction was given that s. 542(2) of the *Code* must be complied with.

Judgment accordingly.

Appendix K

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re Abel et al. and Director, Penetanguishene Mental Health Centre
Re Abel et al. and Advisory Review Board et al.

O'DRISCOLL, GRANGE AND SOUTHEY, JJ. — 16TH FEBRUARY 1979.

Extraordinary remedies — Certiorari — Applicants held in mental health centre under Lieutenant-Governor's warrants as result of finding of unfitness to stand trial or verdict of not guilty by reason of insanity in criminal matters — Advisory Review Board annually reviewing applicants' cases and making recommendations to Lieutenant-Governor — Chairman of Board refusing request by applicants' counsel for access to information submitted by hospital for Board's use on basis he had no power to allow access — Whether certiorari lies to review decision — Whether only Federal Court of Appeal has jurisdiction to review Board's decision — Whether rules of natural justice apply to proceedings before Board — Cr. Code, s. 547 — Mental Health Act, R.S.O. 1970, c. 269, ss. 27, 28, 29, 31 — Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), ss. 2, 28 — Statutory Powers Procedure Act, 1971 (Ont.), c. 47, s. 3.

Mental health — Advisory Review Board — Applicants held in mental health centre under Lieutenant-Governor's warrants as result of finding of unfitness to stand trial or verdict of not guilty by reason of insanity in criminal matters — Advisory Review Board annually reviewing applicants' cases and making recommendations to Lieutenant-Governor — Chairman of Board refusing request by applicants' counsel for access to information submitted by hospital for Board's use on basis he had no power to allow access — Whether certiorari lies to review decision — Whether only Federal Court of Appeal has jurisdiction to review Board's decision — Whether rules of natural justice apply to proceedings before Board — Cr. Code, s. 547 — Mental Health Act, R.S.O. 1970, c. 269, ss. 27, 28, 29, 31 — Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), ss. 2, 28 — Statutory Powers Procedure Act, 1971 (Ont.), c. 47, s. 3.

Courts — Jurisdiction — Federal Court — Applicants held in mental health centre under Lieutenant-Governor's warrants as result of finding of unfitness to stand trial or verdict of not guilty by reason of insanity in criminal matters — Advisory Review Board annually reviewing applicants' cases and making recommendations to Lieutenant-Governor — Chairman of Board refusing request by applicants' counsel for access to information submitted by hospital for

Board's use on basis he had no power to allow access — Whether Federal Court of Appeal has exclusive jurisdiction to review decisions of Board as "federal board" — Cr. Code, s. 547 — Mental Health Act, R.S.O. 1970, c. 269, ss. 27, 28, 29, 31 — Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), ss. 2, 28.

The applicants, persons charged with criminal offences or found not guilty by reason of insanity of such offences, were all held under Lieutenant-Governor's warrants in the Penetanguishene Mental Health Centre in Ontario. At their hearing before the Advisory Review Board counsel for the applicants sought access to the files of the hospital or disclosure of the information in the reports put before the Board by the hospital. The Chairman of the Board refused to give such access or disclosure on the basis that he had no authority to do so. The Board was originally created under the *Mental Health Act*, 1967 (Ont.), c. 51, to review annually the cases of all persons held in custody in psychiatric centres, including persons held under Lieutenant-Governor's warrants, and to make recommendations to the Lieutenant-Governor. These provisions were in force prior to enactment of similar provisions in 1969 in s. 547 of the *Criminal Code*. The Order in Council (O.C. 1486/77) under which the present Advisory Review Board was appointed referred to the *Mental Health Act* only. On application for judicial review, *held*, O'Driscoll, J., dissenting, the application should be granted and the matter remitted to the Board.

Per Grange, J.: The main function of the Advisory Review Board is the compulsory annual consideration of persons confined under a Lieutenant-Governor's warrant and, while the Lieutenant-Governor is not bound by the Board's recommendations, realistically the patient's only hope for release depends on a favourable recommendation by the Board. Since the Board's report does not bind the Lieutenant-Governor the minimum rules of procedure set out in the *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47, do not apply by virtue of s. 3(2)(*g*) of that Act. Nevertheless, the Board is under a duty to act fairly whether its function is properly classified as administrative or *quasi*-judicial and the rules of natural justice may therefore apply. It is a fundamental rule of natural justice that a party have an adequate opportunity to know the case he must meet. However, this does not mean that the reports must necessarily be revealed since there may be circumstances militating against full disclosure. The Board would have a discretion to refuse disclosure where the reports could cause grievous harm to the administration of the hospital and to the patient. However, in this case the Board never considered the question, and by failing to do so and answer it according to proper principles there was a failure of natural justice. The decision of the Board must therefore be quashed and the matter remitted for reconsideration.

Finally, the Board having been set up under provincial legislation, the provincial superior Court rather than the Federal Court has jurisdiction to review its decision. No question as to the constitutionality of the *Mental Health Act* provisions was raised and the enactment of similar *Criminal Code* provisions cannot transform a provincial board into a federal board — it could only put it out of existence.

Per Southey, J.: Notwithstanding that the *Statutory Powers Procedures Act, 1971* does not apply to the Board proceedings, the Court has a common law jurisdiction to grant relief in the nature of *certiorari*. Once the Board decides to hold a hearing under the *Mental Health Act* such hearing must be conducted fairly. Under s. 29(4) of the Act the hospital must furnish to the Chairman of the Board such information and reports as he may request, and the Chairman has power to request all information and reports that exist in relation to any patient and turn them over to the patient or his counsel, if he thinks it proper to do so. The refusal

of the Chairman to apply himself to the merits of the question of access resulted in a failure of natural justice. It must, however, be recognized that, in view of the special circumstances, the Board may decide in a particular case, or as a matter of general policy applicable to all cases, for good reason, that such access should not be permitted. The Board might consider that to permit such access would result in unreasonable risk of prejudice to the successful operation of the centre and to the patients generally. Such a policy might be successfully defended in *certiorari* proceedings.

Per O'Driscoll, J., dissenting: With the enactment of the *Criminal Code* provisions respecting the establishment of the Advisory Review Board the provisions of the *Mental Health Act* were rendered inoperative and the reference in the Order in Council appointing the Board under the *Mental Health Act* should be taken as a reference to the *Criminal Code*. Parliament's power in relation to criminal law and procedure includes the power to make laws with regard to persons in custody under Lieutenant-Governor's warrants. The Advisory Review Board is therefore a "federal board, commission or other tribunal" under s. 2 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), and by virtue of s. 28 of that Act the Federal Court of Appeal has exclusive jurisdiction to review and set aside decisions of the Board.

Even if the Board is not a federal board and the provincial superior Court has jurisdiction to hear this application, the Board is not subject to review. The Board's report, whether made under s. 547 of the *Criminal Code* or the provisions of the *Mental Health Act*, does not bind the Lieutenant-Governor and, thus, the minimal rules of proceedings under the *Statutory Powers Act, 1971* do not apply in view of s. 3(2)(*g*) of that Act which provides that those rules do not apply to persons whose report "does not in any way legally bind or limit [the person to whom the report is made] in any decision he may have power to make".

[*Re Pergamon Press Ltd.*, [1971] Ch. 388; *Re Lingley and Hickman* (1972), 10 C.C.C. (2d) 362, 33 D.L.R. (3d) 593, [1972] F.C. 171, consd; *Re Carrington Building Centre Ltd. and Ontario Housing Corp.* (1973), 2 O.R. (2d) 434, 43 D.L.R. (3d) 178; *Re Lingley and New Brunswick Board of Review* (1975), 25 C.C.C. (2d) 81, 62 D.L.R. (3d) 187, [1976] 1 F.C. 98, 13 N.R. 22; *R. v. Ontario Labour Relations Board, Ex p. Kitchener Food Market Ltd.*, [1966] 2 O.R. 513, 57 D.L.R. (2d) 521; *Re Raney et al. and The Queen in right of Ontario* (1974), 4 O.R. (2d) 249, 47 D.L.R. (3d) 178; *R. v. Gaming Board for Great Britain, Ex p. Benaim et al.*, [1970] 2 Q.B. 417; *Furnell v. Whangarei High Schools Board*, [1973] 2 W.L.R. 92; *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385, [1976] 1 S.C.R. 453, 50 D.L.R. (3d) 349, 3 N.R. 391; *Re Chadwill Coal Co. Ltd. et al. and McCrae et al.* (1976), 14 O.R. (2d) 394; *Re Cardinal and Board of Com'rs of Police of City of Cornwall* (1973), 2 O.R. (2d) 183, 42 D.L.R. (3d) 323; *Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N.R. 410; *Re Webb and Ontario Housing Corp.* (1978), 22 O.R. (2d) 257, 93 D.L.R. (3d) 187; *Re H.K. (An Infant)*, [1967] 2 Q.B. 617; *Ex parte Kleinys*, [1965] 3 C.C.C. 102, 49 D.L.R. (2d) 225, 46 C.R. 141, 51 W.W.R. 597; *Fawcett v. A.-G. Ont.*, [1965] 2 C.C.C. 262, [1964] S.C.R. 625, 45 D.L.R. (2d) 579, 44 C.R. 201, refd to]

Extraordinary remedies — Certiorari — Applicants held in mental health centre under Lieutenant-Governor's warrants — Application in nature of certiorari to review decision of centre refusing applicants' counsel access to hospital files — Application dismissed — Access to such files governed by statute and decision not that of tribunal — Decision not reviewable — Mental Hospitals Act, R.S.O. 1970, c. 270 — R.R.O. 1970, Reg. 578, s. 3.

APPLICATION for judicial review of decisions of the Penetanguishene Mental Health Centre and the Advisory Review Board.

R. D. Manes and *L. H. Wolfson*, for applicants.
D. W. Brown, for Director of Penetanguishene Mental Health Centre.
M. Manning, for Advisory Review Board.

O'DRISCOLL, J. (dissenting):—The applicants are persons held at the Penetanguishene Mental Health Centre, Oak Ridge Division, pursuant to warrants of the Lieutenant-Governor of the Province of Ontario issued under s. 545 [am. 1972, c. 13, s. 45; 1974-75-76, c. 93, s. 69] and s. 546 [am. *idem*, s. 70] of the *Criminal Code* of Canada after:

(a) a finding of insanity (s. 16 of the *Criminal Code*) at the time of the alleged crime (s. 542(2)), or
(b) a finding that the person was unfit to stand trial (s. 543(6) of the *Criminal Code*), or
(c) after the Lieutenant-Governor was satisfied that a prisoner serving a sentence is insane, mentally ill or mentally defective or feeble-minded (s. 546(1) of the *Criminal Code*).

Two applications for judicial review were argued before us:
1. "The Hospital or Centre Application."
In this application the applicants seek:

> An order in the nature of a declaration declaring that the exercise of discretion vested in an officer in charge pursuant to s. 3 of Reg. 578, R.R.O. 1970, Vol. 3, made pursuant to The Mental Hospital Act, R.S.O. 1970, c. 27, s. 5(1), is subject to the provisions of The Statutory Powers Procedure Act, 1971, and The Judicial Review Procedure Act, 1971.

For the reasons stated by Grange, J., I agree that the "Hospital or Centre Application" must be dismissed.
2. "The Advisory Review Board Application."
In this application the applicants seek, amongst other orders:

> (a) An Order in the nature of a declaration declaring that the Advisory Review Board (hereinafter referred to as the Board), while conducting a hearing pursuant to Section 31 and 29 of the *Mental Health Act*, R.S.O. 1970, c. 269, is subject to the provisions of *The Statutory Powers Procedure Act*, 1971 and *The Judicial Review Procedure Act*, 1971; and subject to the provisions of Sections 545 and 547 of the Criminal Code (Canada).
>
> (b) An Order in the nature of certiorari quashing the decision of the Board denying the Applicants or their legal or medical appointees disclosure of any information that had been or was intended to be made available to the Advisory Review Board for the purpose of being taken into consideration by the Board in reaching its decision, including any and all medical or psychiatric information or reports that had been or was intended to be made available to the Board by the Officer-in-Charge of the said

psychiatric facility pursuant to Section 29(4) of the *Mental Health Act* or otherwise.

(c) An Order in the nature of a declaration declaring that the decision of the Board denying the Applicants or their medical or legal appointees such disclosure had the effect of denying the Applicants their right to an inquiry or hearing as required by Sections 31 and 29 of the *Mental Health Act* and, accordingly, constituted a violation of the principles of natural justice;

Prior to October, 1969, the *Criminal Code* of Canada did not provide any machinery for the consideration and review of whether or not a person being held under a Lieutenant-Governor's warrant had "recovered". In Ontario, as I recall it, once a year the Chief Justice of Ontario received representations in his Chambers from the then Director of Public Prosecutions concerning those patients at Oak Ridge that the medical director and his staff were of the opinion had "recovered".

The Chief Justice of Ontario, after hearing the representations, would then report to the Lieutenant-Governor.

In 1967 the Legislature of Ontario passed the *Mental Health Act*, 1967 (Ont.), c. 51:

31(1) The Lieutenant Governor in Council may appoint an advisory review board for any one or more psychiatric facilities that has a review board.

(2) An advisory review board shall be composed of a judge or a retired judge of the Supreme Court who shall serve as chairman, a psychiatrist and any three members who constitute a quorum of the review board.

(3) Subsections 4, 5 and 6 of section 27 apply *mutatis mutandis* to the members of an advisory review board.

(4) The five members of an advisory review board constitute a quorum and the recommendation of a four-fifths majority is the recommendation of the advisory review board.

(5) The case of every patient in a psychiatric facility who is detained under the authority of a warrant of the Lieutenant Governor under the *Criminal Code* (Canada) shall be considered by the advisory review board having jurisdiction once in every year, commencing with the year next after the year in which the warrant was issued.

(6) Notwithstanding subsection 5, the advisory review board shall consider the case of any patient to which that subsection applies at any time upon the written request of the Minister.

(7) Section 29 applies *mutatis mutandis* to cases under this section.

(8) Upon the conclusion of an inquiry, the chairman shall prepare a written report of the recommendations of the advisory review board and, within the time prescribed by the regulations, shall transmit a copy thereof to the Lieutenant Governor in Council, and may in his discretion transmit a copy thereof to any other person.

During first reading of the *Mental Health Act, 1967*, on May 19, 1967, the then Minister of Health said in the Legislature (Debates of the Ontario Legislature, May 19, 1967, pp. 3638-9):

I have been concerned that the law has failed to recognize the rights of patients detained under warrant of the Lieutenant-Governor. These patients have been found to be unfit to stand trial or not guilty of crime by reason of insanity. In the absence of express statutory provision dealing with those cases, I have, wherever indicated, arranged for their review on an extra-statutory basis. Because of the structure of the present statutes and due to certain legal technicalities, it was not feasible to provide machinery for review of these cases when statutory boards of review were established last year. Since that time, and after a thorough consideration of the legal issues involved, I am pleased to report that patients under warrant of the Lieutenant Governor will enjoy the right of an independent review on a regularized legislative basis. Such reviews will be conducted by advisory review boards under the chairmanship of a Supreme Court judge. The status of these patients will be considered automatically at least once in every year. I take pride in mentioning that Ontario is the first province to move forward in this way. It now can be said that no patient detained in any psychiatric facility in this province will be without the opportunity of receiving an independent review of his case.

By Order in Council approved by Her Honour the Lieutenant-Governor dated May 23, 1977 (O.C. 1486/77), the present Advisory Review Board was appointed for a three-year term "under s. 31 of The Mental Health Act".

By 1968-69 (Can.), c. 38, s. 48, s. 547A was introduced into the *Criminal Code* of Canada effective October 1, 1969; by 1974-75-76 (Can.), c. 93, s. 71(1) to (4), s. 547(2) of the *Criminal Code* was amended to provide for the constitution of the Advisory Review Board and to designate a chairman, and ss. 547(5)(*f*) and 547(7) were added.

The present s. 547 reads:

547(1) The lieutenant governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2).

(2) The board referred to in subsection (1) shall consist of not less than three and not more that five members of whom one member shall be designated chairman by the members of the board, if no chairman has been designated by the lieutenant governor.

(3) At least two members of the board shall be duly qualified psychiatrists entitled to engage in the practice of medicine under the laws of the province for which the board is appointed, and at least one member of the board shall be a member of the bar of the province.

(4) Three members of the board of review, at least one of whom is a psychiatrist described in subsection (3) and one of whom is a member of the bar of the province, constitute a quorum of the board.

(5) The board shall review the case of every person referred to in subsection (1)

(*a*) not later than six months after the making of the order referred to in that subsection relating to that person, and

(*b*) at least once in every twelve month period following the review required pursuant to paragraph (*a*) so long as the person remains in custody under the order,

and forthwith after each review the board shall report to the lieutenant governor setting out fully the results of such review and stating

(*c*) where the person in custody was found unfit on account of insanity to stand his trial, whether, in the opinion of the board, that person has recovered sufficiently to stand his trial,

(*d*) where the person in custody was found not guilty on account of insanity, whether, in the opinion of the board, that person has recovered and, if so, whether in its opinion it is in the interest of the public and of that person for the lieutenant governor to order that he be discharged absolutely or subject to such conditions as the lieutenant governor may prescribe,

(*e*) where the person in custody was removed from a prison pursuant to subsection 546(1), whether, in the opinion of the board, that person has recovered or partially recovered, or

(*f*) any recommendations that it considers desirable in the interests of recovery of the person to whom such review relates and that are not contrary to the public interest.

(6) In addition to any review required to be made under subsection (5), the board shall review any case referred to in subsection (1) when requested to do so by the lieutenant governor and shall forthwith after such review report to the lieutenant governor in accordance with subsection (5).

(7) For the purposes of a review under this section, the chairman of a board has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on commissioners appointed under Part I of that Act.

After the introduction of s. 547 of the *Criminal Code* on October 1, 1969, in the Province of New Brunswick, for example, the Lieutenant-Governor appointed a board of review under the provisions of s. 547 of the *Criminal Code*.

I agree with Grange, J., when he states in his reasons [*post*, p. 289]: "No question of the constitutionality of the Ontario legislation or the ARB was raised before us and the question will not be considered in these reasons."

However, in the statement of fact and law of counsel for: (1) the Director of the Penetanguishene Mental Health Centre, (2) the Supervisor of Clinical Records Services of Penetanguishene Mental Health Centre, (3) the Minister of Health for the Province of Ontario, and (4) the Statutory Powers Procedure Rules Committee, the following is found:

The Preliminary Issue

The Advisory Review Board is a "Federal Board, commission or other tribunal" and as a result this court does not have jurisdiction ...

The power of Parliament in relation to criminal law and procedure includes the power to make laws with regard to the custody

of persons found "not guilty on account of insanity" or persons "unfit to stand trial" or persons who become insane while serving a sentence: see *R. v. Trapnell* (1910), 17 C.C.C. 346 at pp. 349-50, 20 O.W.N. 174 at pp. 174-5, *per* Meredith, J.A.

Parliament has provided in ss. 542(1) and 543(6) that the custody of the insane person shall be "at the pleasure of the Lieutenant Governor"; Parliament may also provide for the discharge from custody of such persons who are serving an "indeterminate sentence": see *Ex parte Kleinys*, [1965] 3 C.C.C. 102 at p. 106, 49 D.L.R. (2d) 225 at p. 228, 46 C.R. 141, *per* Ruttan, J.

Is the Advisory Review Board in Ontario a board that derives its authority from s. 547 of the *Criminal Code* or s. 31 of the *Mental Health Act*, R.S.O. 1970, c. 269 (which is in substantially the same terms as the *Mental Health Act, 1967*)?

In *Fawcett v. A.-G. Ont.*, [1965] 2 C.C.C. 262 at p. 267, [1964] S.C.R. 625 at p. 630, 45 D.L.R. (2d) 579 at p. 586, Cartwright, J., in giving the unanimous judgment of the Court said:

> I agree with the submission of counsel for the Attorney-General of Canada that if a particular case should arise in which the circumstances were such that the provisions of the *Criminal Code* would bring about one result and those of the Act would bring about a different result then the provisions of the *Criminal Code* would prevail; but there are no such circumstances in the case at bar.

In my view, s. 31 of the *Mental Health Act* was rendered inoperative by the enactment of s. 547A of the *Criminal Code* of Canada (now s. 547). In my opinion, s. 31 of the *Mental Health Act* is merely a method of carrying out the appointment provisions of s. 547 of the *Criminal Code*, and the reference to s. 31 in the Order in Council appointing the Advisory Review Board should be taken as a reference to s. 547 of the *Criminal Code* of Canada.

In my view, the Advisory Review Board under consideration is a "federal board, commission or other tribunal" under s. 2 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), which means "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada ...".

It follows that the Federal Court of Appeal, pursuant to s. 28 of the *Federal Court Act*, would have exclusive jurisdiction to review and set aside orders and decisions of the Advisory Review Board, a federal tribunal, and this application is consequently improperly before the Divisional Court.

Section 28 of the *Federal Court Act*:

> 28(1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an

administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the Board, commission or tribunal

(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

I note that in *Re Lingley and New Brunswick Board of Review* (1975), 25 C.C.C. (2d) 81 at pp. 83-4, 62 D.L.R. (3d) 187 at pp. 189-90, [1976] 1 F.C. 98, the Federal Court of Appeal, in a unanimous judgment, following an application under s. 28 of the *Federal Court Act* to review and set aside a recommendation of an Advisory Review Board, appointed by the Lieutenant-Governor of New Brunswick under s. 547 of the *Criminal Code* of Canada, said:

Section 28 empowers the Federal Court of Appeal to review and set aside orders and decisions of federal tribunals other than orders and decisions of those tribunals which are not required by law to be made on a judicial or *quasi*-judicial basis. An act done by a federal tribunal cannot, therefore, be reviewed by this Court unless it be, first, an *order or a decision* and, second, an order or a decision *of the kind contemplated by s. 28.* It is clear that the recommendation of a Board under s. 547 of the *Criminal Code* is not an order. It also appears to me that such a recommendation is not a decision within the meaning of s. 28(1).

Previous judgments of the Court establish that many expressions of opinion, which are commonly referred to as decisions, do not constitute decisions within the meaning of s. 28 if they do not, in law, settle a matter and have no binding effect: see *Re A.-G. Can. and Cylien* (1973), 43 D.L.R. (3d) 590, [1973] 2 F.C. 1166; *Re B.C. Provincial Council United Fishermen and Allied Workers' Union and B.C. Packers Ltd. et al.* (1973), 45 D.L.R. (3d) 372, [1973] 2 F.C. 1194, 1 N.R. 201; *Re Danmore Shoe Co. Ltd.*, [1974] 1 F.C. 22, 1 N.R. 422; *Bay v. The Queen*, [1974] 1 F.C. 523, 2 N.R. 513. A recommendation such as the one under attack lacks these characteristics. It does not determine or purport to determine whether the person in custody is to be discharged; under the statute such a determination is to be made by the Lieutenant-Governor. Moreover, the recommendation of the Board, being the mere expression of an opinion, is not binding on anyone; it does not bind the Lieutenant-Governor, who may choose to ignore it, and it is not even binding on the Board itself since the Board could certainly modify the views expressed in its report.

For these reasons, I am of opinion that this s. 28 application should be dismissed on the ground that this Court has no jurisdiction under s. 28(1) to set aside a recommendation or report made by a Board under s. 547 of the *Criminal Code.*

If I am wrong in the above conclusions and the Advisory Re-

view Board in Ontario is not a "federal tribunal" under s. 2 of the *Federal Court Act* but is, in fact, a provincial tribunal and the Divisional Court has jurisdiction to hear the application in question, in my view, the Advisory Review Board in Ontario is not subject to review because the Board's report under s. 547 of the *Criminal Code* (or under s. 31(8) of the *Mental Health Act*) does not bind the Lieutenant-Governor and, thus, the minimal rules for proceedings under the *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47, as amended, do not apply.

> 3(2) This Part does not apply to proceedings,
>
> . . . . .
>
> (*g*) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make;

In *R. v. Ontario Labour Relations Board, Ex p. Kitchener Food Market Ltd.*, [1966] 2 O.R. 513 at p. 522, 57 D.L.R. (2d) 521 at p. 530, the Ontario Court of Appeal held that a decision of the Ontario Labour Relations Board, in response to a request from the Minister, to investigate and recommend on a certain question, is for the purpose of informing the Minister, and is not a decision that affects rights, or imperils the interests of a party since it is only the subject-matter of a report from which nothing flows, unless the Minister takes some further step; it is mere advice from the Board to the Minister and has no independent effect and is not subject to attack by *certiorari*.

Laskin, J.A. (as he then was), said:

> In my opinion, it is in law nothing more than advice even though it may be realistic to anticipate that the Minister would act upon it.
>
> . . . . .
>
> The governing phrase in s. 79*a* is "report to the Minister". What the Board decides has no legal effect; first, because the proceeding before it is not a required original step leading to adverse action against the parties; and, secondly, because the Board's decision does not control in law any following action of the Minister. The line of cases of which *R. v. Electricity Commissioners; Ex p. London Electricity Joint Committee Co. (1920) Ltd.*, [1924] 1 K.B. 171, is the prize exemplar is distinguishable from the situation in the case at bar. There is here no action which statutorily must originate in the Board and be followed by approval of another body before anything binding results. The present case is rather more akin to *R. v. Statutory Visitors to St. Lawrence's Hospital, Caterham; Ex. p. Pritchard*, [1953] 2 All E.R. 766.

In *R. v. Statutory Visitors to St. Lawrence's Hospital, Caterham, Ex p. Pritchard*, [1953] 2 All E.R. 766, the headnote reads in part:

> ... under s. 11(2) it was for the Board of Control, and not for the visitors, to decide whether the continuance of the detention order was required in the interests of the infant and to make an order for that purpose; the visitors were not a tribunal and had no power to come to any decision; the special report submitted by them to the board merely contained evidence to enable the board to come to a decision; and, therefore, certiorari would not go to quash the report of their opinion.

In the result, I would quash the application brought against the Advisory Review Board.

In my view, there should be no order as to costs.

GRANGE, J.:—These are two applications for judicial review of decisions refusing to produce or make available certain medical records and reports. The applicants are all persons who have been charged with criminal offences, found not guilty by reason of insanity and confined under Lieutenant-Governor's warrants in the Penetanguishene Mental Health Centre. In one application, the respondents are the directors of the Centre and others; in the other the respondents are the Advisory Review Board and others. I shall refer to the former application as the "Centre" application and the latter as the "ARB" or the "Board" application.

The ARB was created by Order in Council [O.C. 1486/77] pursuant to the *Mental Health Act*, R.S.O. 1970, c. 269, and consists of a Supreme Court Judge as Chairman, another Supreme Court Judge as alternate chairman and some 35 members. The relevant legislation will be referred to later, but it is sufficient at the outset to state that one of the purposes of the Board is to consider each year the case of every patient in a psychiatric facility confined there under the warrant of the Lieutenant-Governor pursuant to the *Criminal Code* and to make to the Lieutenant-Governor in Council a report concerning him including, of course, any recommendation for his release. The *Criminal Code* also has provisions for the establishment of a board of review (see *Criminal Code*, s. 547 [am. 1974-75-76, c. 93, s. 71] for substantially the same purpose and other Provinces have established boards thereunder, but Ontario has proceeded under the *Mental Health Act*. No question of the constitutionality of the Ontario legislation or the ARB was raised before us and the question will not be considered in these reasons.

The ARB, pursuant to its statutory duty, was proceeding to consider the case of the applicants and for the purpose scheduled hearings for October, 1977. In preparation for the hearings, counsel for the applicants attended at the Health Centre to seek access to the files of that Centre concerning his clients, particularly concerning any information or reports that were to be made

available to the Board to assist it in its consideration of the cases. Access to those files and to those reports was refused, although some co-operation was offered to counsel. On October 11th, counsel attended before the Board at the hearing itself and asked to have access to the files or disclosure of the information in the reports put before the Board. It appears from the affidavit filed before us that the Chairman of the Board refused to give such access or disclosure on the ground that he (the Chairman) had no authority to do so. Counsel then made no submissions and the applicants refused to answer any questions posed by the Board and the hearing terminated.

The ultimate issue is, of course, whether the Centre or the Board was required to divulge any of the documents asked, but before we get to that issue we must first consider the reviewability of the decisions of the Centre and of the Board.

In the case of the Centre the answer, in my view, is relatively easy. The Centre is not a tribunal. The files are theirs; the reports are intended for the Board. It is only in relation to their use by the Board that the problem comes up at all. Moreover, the problem is covered by legislation. I refer to R.R.O. 1970, Reg. 578, s. 3 [repealed O. Reg. 843/78, s. 1], under the *Mental Hospitals Act*, R.S.O. 1970, c. 270, as follows:

> 3(2) No person shall have access to the records of a patient unless he has the authority of the officer-in-charge.
>
> (3) No disclosure shall be made from the records of a patient without the authority of the officer-in-charge.
>
> (4) The officer-in-charge may disclose or authorize the disclosure of information from the records of a patient,
>
> (*a*) with the written consent of,
>
> (i) the patient if he is competent to give consent, or
>
> (ii) the guardian or nearest relative of the patient if the patient is incompetent to give consent, or
>
> (*b*) for academic, research or statistical purposes; or
>
> (*c*) where it is clearly not against the best interests of the patient.
>
> (5) The officer-in-charge shall disclose or authorize disclosure of information from the records of a patient,
>
> (*a*) upon the order of a court of competent jurisdiction; or
>
> (*b*) when otherwise required to do so by law.

If we assume the patient to have been competent and to have consented the officer in charge of the Centre would have been entitled to disclose the information requested but he would not have been obliged to do so unless required to do so by order of the Court or otherwise by law. The order of the Court would have been forthcoming only if the material in a particular case justified the making of an order. Entirely apart from whether the

Divisional Court has jurisdiction to entertain such an application, it is an originating application and not one by way of judicial review. Failing a Court order the director has an absolute right to refuse access to the information or reports. The Court (perhaps not this Court) may order him to produce before or after his refusal but it makes that order not because of some defect in the director's action but because of some conclusion it has reached on its own. That application must, therefore, be dismissed.

The real problem we are faced with is in respect of the decision of the Chairman of the ARB declining to order the production of the reports of the Centre. In my view, this problem requires consideration of the function of the Board and certain sections of the *Mental Health Act* under which it is set up. These sections are:

> 27(1) The Lieutenant Governor in Council may appoint a review board for any one or more psychiatric facilities.
>
> (2) A review board shall be composed of three or five members, at least one and not more than two of whom are psychiatrists and at least one and not more than two of whom are barristers and solicitors and at least one of whom is not a psychiatrist or a barrister and solicitor.
>
> . . . . .
>
> 29(1) Upon receipt of an application by the chairman, the review board shall conduct such inquiry as it considers necessary to reach a decision and may hold a hearing, which in the discretion of the review board may be *in camera*, for the purpose of receiving oral testimony.
>
> (2) Where a hearing is held, the patient may attend the hearing unless otherwise directed by the chairman and, where he does not attend, he may have a person appear as his representative.
>
> (3) Where a hearing is held, the patient or his representative may call witnesses and make submissions and, with the permission of the chairman, may cross-examine witnesses.
>
> (4) The officer in charge shall, for the purpose of an inquiry, furnish the chairman with such information and reports as the chairman requests.
>
> . . . . .
>
> 31(1) The Lieutenant Governor in Council may appoint an advisory review board for any one or more psychiatric facilities that has a review board.
>
> (2) An advisory review board shall be composed of a judge or a retired judge of the Supreme Court who shall serve as chairman, a psychiatrist and any three members who constitute a quorum of the review board.
>
> . . . . .
>
> (5) The case of every patient in a psychiatric facility who is detained under the authority of a warrant of the Lieutenant Governor under the *Criminal Code* (Canada) shall be considered by the advisory review board having jurisdiction once in every year, commencing with the year next after the year in which the warrant was issued.
>
> . . . . .
>
> (7) Section 29 applies *mutatis mutandis* to cases under this section.

(8) Upon the conclusion of an inquiry, the chairman shall prepare a written report of the recommendations of the advisory review board and, within the time prescribed by the regulations, shall transmit a copy thereof to the Lieutenant Governor in Council, and may in his discretion transmit a copy thereof to any other person.

It is apparent from the above that the main function of the ARB is the compulsory annual consideration of the case of every patient confined as are the applicants under a Lieutenant-Governor's warrant. The Board is entitled under s. 29(4) to require a report from the officer in charge of the facility and may or may not hold a hearing (s. 29(1)). If it does hold a hearing the patient may attend in person or by counsel, call witnesses and make submissions and with permission may cross-examine (s. 29(2) and (3)). Upon conclusion of the inquiry the Chairman prepares a report with recommendations for the Lieutenant-Governor (s. 31(8)). The Lieutenant-Governor is, of course, not bound to act upon the recommendations in the report, but I do not think I go too far — indeed I think I only state the obvious — when I say that a patient's only hope of release lies in a favourable recommendation by the Board.

Just as the Lieutenant-Governor need not act upon the Board's report so the Board need not act upon the information and reports of the officer in charge, but there can be no question that these will influence the Board and may in many cases be decisive. If counsel for the patient seeks, as he must, to represent his client properly, one can well understand his desire, even his imperative need, to examine such reports.

It is argued that the Board is not subject to review. The Board's report does not bind the Lieutenant-Governor and, therefore, the minimum rules for proceedings under the *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47, do not apply: see s. 3 (2)(*g*). Reliance is placed upon *Re Carrington Building Centre Ltd. and Ontario Housing Corp.* (1973), 2 O.R. (2d) 434, 43 D.L.R. (3d) 178; *Re Lingley and New Brunswick Board of Review* (1975), 25 C.C.C. (2d) 81, 62 D.L.R. (3d) 187, [1976] 1 F.C. 98; *R. v. Ontario Labour Relations Board, Ex p. Kitchener Food Market Ltd.*, [1966] 2 O.R. 513, and *Re Raney et al. and The Queen in right of Ontario* (1974), 4 O.R. (2d) 249, 47 D.L.R. (3d) 178.

In my view, while these cases do indeed support the argument they are not precisely on point and are not decisive. In my view, whether or not *certiorari* will lie depends in each case upon the nature of the function performed by the particular body. It is not the law that a body that investigates but does not decide may act contrary to the rules of natural justice. The very point came up

for discussion in the Court of Appeal in England in *Re Pergamon Press Ltd.*, [1971] Ch. 388, where it was sought to overturn a ruling of inspectors who were appointed to investigate a company for the Board of Trade. The ruling was to the effect that the directors of that company must answer certain questions and counsel for the inspectors argued that natural justice was inapplicable. In dealing with the argument, Lord Denning, M.R., disposed of it as follows at pp. 399-400:

> He [counsel for the inspectors] said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply. He cited *Parry-Jones v. Law Society* [1969] 1 Ch. 1 to support his proposition.
>
> I cannot accept Mr. Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see *In re Grosvenor & West-End Railway Terminus Hotel Co. Ltd.* (1897) 76 L. T. 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see *Hearts of Oak Assurance Co. Ltd. v. Attorney-General* [1932] A.C. 392. They do not even decide whether there is a prima facie case, as was done in *Wiseman v. Borneman* [1971] A.C. 297.
>
> But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up: see *In re S.B.A. Properties Ltd.* [1967] 1 W.L.R. 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence had been committed: see section 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the Board may, in their discretion, publish it, if they think fit, to the public at large.
>
> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see *Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.

One of the difficulties in determining the matter is the persistence in some judgments of the distinction between judicial and *quasi*-judicial functions on the one hand and those which are con-

sidered purely administrative on the other. In the former, it is said that the rules of natural justice apply but in the latter they do not. In England the distinction appears to have been abrogated. As Lord Denning put it in *R. v. Gaming Board for Great Britain, Ex p. Benaim et al.*, [1970] 2 Q.B. 417 at p. 430:

> At one time it was said that the principles [of natural justice] only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v. Baldwin* [1964] A.C. 40 . . .

Lord Denning is not alone in bringing "administrative" proceedings within the embrace of natural justice. As Lord Morris of Borth-y-Gest said in *Furnell v. Whangarei High Schools Board*, [1973] 2 W.L.R. 92 at p. 105:

> Natural justice is but fairness writ large and juridically. It has been described as "fair play in action." Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russel v. Duke of Norfolk* [1949] 1 All E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.

Though the distinction still exists in Canada (see s. 28 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), and its application in the majority judgment in *Howarth v. National Parole Board* (1974), 18 C.C.C. (2d) 385, [1976] 1 S.C.R. 453, 50 D.L.R. (3d) 349), I find great difficulty in applying the distinction to any given situation or tribunal. I align myself with those who in this Court have said that the distinction is not important, at least when the question of the duty to act fairly is concerned. See the observations of Reid, J., in *Re Chadwill Coal Co. Ltd. et al. and McCrae et al.* (1976), 14 O.R. (2d) 394 at p. 396, and R.E. Holland, J., in *Re Cardinal and Board of Com'rs of Police of City of Cornwall* (1973), 2 O.R. (2d) 183 at p. 189, 42 D.L.R. (3d) 323 at p. 329.

If then the rules of natural justice may apply notwithstanding that the proceeding will result in a recommendation only, I can think of no case where those rules should be more readily applied than the case at bar. As I said earlier, this is virtually the only chance (albeit an annual chance) that the applicants have of avoiding a lifetime of incarceration. The effect of the recommendation of the ARB is for the applicants of the most vital concern. S.A. de Smith in his work *Judicial Review of Administrative Action*, 3rd ed. (1973), discusses the problem at p. 203 *et seq.* and after concluding that the authorities are often in conflict suggests that the degree of proximity between the investigation and the decision and the exposure of the person investigated to harm are matters of paramount concern. Here the proximity is great; as Heald, J., said in a previous proceeding relating to the patient Lingley, *sub nom. Re Lingley and Hickman* (1972), 10 C.C.C. (2d)

362 at pp. 367-8, 33 D.L.R. (3d) 593 at pp. 598-9, [1972] F.C. 171, dealing with a review board set up under the *Criminal Code*:

> In my view, one is entitled to assume that the Lieutenant-Governor acting prudently and judiciously would give much weight to the considered opinion of a Board like this — heavily weighted as it is with personnel equipped with expertise so relevant to the issues in cases of this kind. If my assumptions are correct, then the deliberations and conclusions of such a board become important indeed to the individual concerned whose liberty may be at stake. Surely, in these circumstances, it is vital that the principles of natural justice be observed by a board such as this.
>
> If the principles of natural justice are not followed by such a board, if such a board, acting on improper principles, makes an improper report to the Lieutenant-Governor, can such an injustice ever be corrected at a later date? I think not, as the critical point in the total proceedings might well be at the Board of Review stage.
>
> There might be little point in the Court exercising its supervisory jurisdiction over subsequent proceedings leading to a decision if a wrong report based on wrong principles is permitted to strongly influence the decision-making body.
>
> Put another way, the report and recommendations of the Board of Review to the Lieutenant-Governor sets in motion a chain of events leading to a determination of rights affecting the liberty of the individual in question.

He goes on to say that in his opinion *certiorari* might not lie but declaratory relief would be available. For the reasons I have given I think *certiorari* will lie and it is unnecessary to resort to declaratory relief. The second test of de Smith is easily met when one considers the effect the recommendation and its acceptance has on the freedom of the applicants.

One of the fundamental rules of natural justice is, of course, as put by de Smith at p. 178: "A party must have an adequate opportunity of knowing the case he has to meet, of answering it and of putting his own case." That is not, however, to say that the reports must necessarily be revealed. Normally he should be given the opportunity of perusal. One can readily imagine those reports containing allegations of fact detrimental to the applicant which could readily be refuted. But there may be circumstances militating against full disclosure. As put by de Smith, at p. 180:

> To the general rule there are various exceptions, some of which have already been indicated. There are cases where disclosure of evidential material might inflict serious harm on the person directly concerned (*e.g.* disclosure of a distressing medical report to a claimant for a social security benefit) or other persons, or where disclosure would be a breach of confidence or might be injurious to the public interest (*e.g.* because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, and might make it impossible to obtain certain classes of essential information at all in the future). In such situations the person claiming to be aggrieved should nevertheless be adequately apprised of the case he has to answer, subject to the need for withholding details in order to protect other overriding interests.

There is no question that the exercise of the discretion to require the production of the reports might in this instance cause grievous harm to the administration of the Centre and indeed to the patient. But the problem as I see it is that the question was never faced. The Chairman denied the request for production upon the ground that he had no jurisdiction. No doubt he meant that he had no jurisdiction to order the medical Centre to produce the files; he needed no jurisdiction to hand over to the applicants' counsel the reports which the Board had received pursuant to s. 29(4) of the *Mental Health Act*. What was needed, in my respectful opinion, was consideration of whether or not those reports should be disclosed to the applicants. When the Chairman failed to consider that question and answer it according to proper principles there was a failure of natural justice.

It follows that in my opinion the application against the ARB must be granted, the decision of the Chairman in refusing to order production of the reports of the officer in charge quashed, and the matter remitted to the Board for reconsideration in accordance with the principles set out above. The applicants should be entitled to their costs against the respondent Board. There should be no costs to or against the Minister of Health or the Statutory Powers Procedure Rules Committee.

The application against the respondent Centre and others should be dismissed without costs.

Since writing the above I have read the reasons of my brother O'Driscoll who would dismiss the ARB application on the grounds first that the Board is a federal board and, therefore, its control lies in the Federal Court of Appeal and, secondly, that the Board's report is not binding upon the Lieutenant-Governor and is, therefore, not subject to *certiorari*.

I respectfully disagree with O'Driscoll, J., on both grounds. The Board is an emanation of the Province having been set up under the *Mental Health Act*. It may be that the enactment of s. 547 of the *Criminal Code* has rendered unconstitutional or inoperative s. 31 of the *Mental Health Act* but that question was neither raised nor argued before us. In my view, however, the enactment of the *Criminal Code* section could not transform a provincial board into a federal board. It could only put it out of existence.

For the reasons I have set forth earlier I would quash the decision of the Board notwithstanding the non-binding nature of its report. There have now been released the reasons of the Supreme Court of Canada in *Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police* (October 3, 1978, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N.R. 410), and those of the Court of Appeal in *Re Webb and Ontario Housing Corp.* (December 11,

1978, 22 O.R. (2d) 257, 93 D.L.R. (3d) 187). While neither of these cases concerned a non-binding report, they both reaffirmed and perhaps extended the duty of fairness required of all persons or bodies exercising power even though the exercise of that power might be classed as administrative rather than judicial or *quasi*-judicial. The obligation to "act fairly" perhaps lacks precision of definition and doubtless it involves something less than the strict application of the rules of natural justice but it may in some circumstances involve the application of some or all of those rules. Certainly, in my opinion, it embraced in these circumstances the consideration upon proper principles of whether or not the reports should be disclosed to the applicants. In failing to give to that question that consideration, the Board, in my respectful opinion, failed to meet the legal test of fairness.

SOUTHEY, J.:—I concur with the decision of my brother Grange in respect of both applications.

As to the Centre application, I agree entirely with the reasons he has so clearly expressed for dismissing the application and have nothing to add.

As to the Board application, I fully agree with his reasons for holding that we have jurisdiction under the *Judicial Review Procedure Act*, 1971 (Ont.), c. 48, to grant relief in the nature of *certiorari*, even though the Board's function is not to make a binding decision, but only to make a report to the Lieutenant-Governor in Council with its recommendations.

Part I of the *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47, does not apply to proceedings before the Board, in my judgment, because s. 3(2)(*g*) provides that such Part does not apply to proceedings:

> (*g*) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make;

The Statutory Powers Procedure Rules Committee established under Part II of the *Statutory Powers Procedure Act, 1971*, is charged with the duty under s. 27(*b*) of the Act of maintaining under continuous review the practice and procedure before the Board. I assume the Board has no rules of procedure governing its proceedings, as none were mentioned in the argument before us. That being so, the Committee may require the Board to formulate and report to the Committee such rules. We have no jurisdiction however, to compel the Committee to require the Board to make such rules, as was submitted on behalf of the applicants.

Our jurisdiction to grant relief in the nature of *certiorari* in

the Board application, in my judgment, is a common law jurisdiction that is continued by s. 2(1), para. 1, of the *Judicial Review Procedure Act, 1971*. I am quite satisfied that once the Board decides to hold a hearing under s. 29(1) of the *Mental Health Act*, R.S.O. 1970, c. 269, such hearing must be conducted fairly. To the authorities on this point that are dealt with so lucidly in the reasons of my brother Grange, I would add only a reference to *Re H.K. (An Infant)*, [1967] 2 Q.B. 617.

Section 29(4) of the *Mental Health Act* directs the officer in charge of the Centre to furnish the Chairman of the Board for the purpose of an inquiry such information and reports as the Chairman may request. The Chairman, in my judgment, has the power to request all information and reports that exist in relation to any patient, and to turn such information and reports over to the patient or his counsel, if he thinks it proper to do so. The Chairman, in my view, was wrong in refusing counsel for the applicant to have access to the files of the applicant on the ground that he had no authority to do so. He had such authority and he should have denied access only if, after due consideration, he was satisfied in a particular case, or as a matter of general policy applicable to all cases, for good reason, that such access should not be permitted. I agree with my brother Grange that when the Chairman refused to apply himself to the merits of the question of access, there was a failure of natural justice and that the Board application should be disposed of in the manner proposed by Grange, J.

I recognize that the Board functions in an extremely sensitive area, in which it must both protect the public and have regard to the interests of the patients who have recovered and those less fortunate who are still under treatment. Because of the subject-matter of the proceedings, certain rules which are generally regarded as essential to natural justice have already been abrogated by s. 29 of the *Mental Health Act*. It may be the Board may decide that it can never permit patients, or their counsel, to have access to the information and reports in question, without incurring an unreasonable risk of prejudice to the successful operation of the Centre, and, accordingly, of harm to patients generally. If the non-disclosure resulted from a policy adopted for that reason, it might be successfully defended on an application for *certiorari*. But it is for the Board, not for the Court, to decide in the first instance whether such a policy is necessary.

Application granted.

Appendix L

[COURT OF APPEAL]

Re Abel et al. and Advisory Review Board

HOWLAND C.J.O., ARNUP, ZUBER, WEATHERSTON AND THORSON JJ.A. — 31ST OCTOBER 1980.

Constitutional law — Paramountcy — Province establishing board to review cases of persons held involuntarily in psychiatric facilities — Function of Board including review of cases of persons held under warrant of Lieutenant-Governor under Criminal Code — Criminal Code later amended to provide for similar board — Minor procedural differences between provincial and federal legislation — Only those parts of provincial legislation incompatible with federal legislation inoperative — Board itself validly appointed under provincial legislation — Cr. Code, s. 547 — Mental Health Act, R.S.O. 1970, c. 269, ss. 29, 31 — Interpretation Act, R.S.O. 1970, c. 225, s. 30.15.

[*Re Fisheries Act, 1914; A.-G. Can. v. A.-G. B.C.*, [1930] 1 D.L.R. 194, [1930] A.C. 111, [1929] 3 W.W.R. 449; *Fawcett v. A.-G. Ont.*, [1964] S.C.R. 625, [1965] 2 C.C.C. 262, 45 D.L.R. (2d) 579, 44 C.R. 201; *Multiple Access Ltd. v. McCutcheon et al.* (1978), 19 O.R. (2d) 516*n*, 86 D.L.R. (3d) 160*n*; affg 16 O.R. (2d) 593, 78 D.L.R. (3d) 701, 2 B.L.R. 129; revg 11 O.R. (2d) 249, 65 D.L.R. (3d) 577; *O'Grady v. Sparling*, [1960] S.C.R. 804, 128 C.C.C. 1, 25 D.L.R. (2d) 145, 33 C.R. 293, 33 W.W.R. 360, refd to]

Certiorari — Availability — Applicants held in mental health centre under Lieutenant-Governor's warrants as result of finding of unfitness to stand trial or verdict of not guilty by reason of insanity in criminal matters — Advisory Review Board annually reviewing applicants' cases and making recommendations to Lieutenant-Governor — Chairman of Board refusing request by applicants' counsel for access to information submitted by hospital for Board's use on basis he had no power to allow access — Whether certiorari lies to review decision — Whether Board under duty to act fairly — Cr. Code, s. 547 — Mental Health Act, R.S.O. 1970, c. 269, ss. 27, 28, 29, 31 — Statutory Powers Procedure Act, 1971 (Ont.), c. 47, s. 3.

Mental health — Advisory Review Board — Applicants held in mental health centre under Lieutenant-Governor's warrants as result of finding of unfitness to stand trial or verdict of not guilty by reason of insanity in criminal matters — Advisory Review Board annually reviewing applicants' cases and making recommendations to Lieutenant-Governor — Chairman of Board refusing request by applicants' counsel for access to information submitted by hospital for Board's use on basis he had no power to allow access — Whether certiorari

lies to review decision — Whether Board under duty to act fairly — Cr. Code, s. 547 — Mental Health Act, R.S.O. 1970, c. 269, ss. 27, 28, 29, 31 — Statutory Powers Procedure Act, 1971 (Ont.), c. 47, s. 3.

The applicants, persons charged with criminal offences or found not guilty by reason of insanity of such offences, were all held under Lieutenant-Governor's warrants in the Penetanguishene Mental Health Centre in Ontario. At their hearing before the Advisory Review Board counsel for the applicants sought access to the files of the hospital or disclosure of the information in the reports put before the Board by the hospital. The Chairman of the Board refused to grant such access or disclosure on the ground that he had no authority to do so. The Board was originally created under the *Mental Health Act*, 1967 (Ont.), c. 51 (now R.S.O. 1970, c. 269), to review annually the cases of all persons held in custody in psychiatric centres, including persons held under Lieutenant-Governor's warrants, and to make recommendations to the Lieutenant-Governor. These provisions were in force prior to enactment of similar provisions in 1969 in s. 547 of the *Criminal Code*. An application to the Divisional Court for judicial review was granted and the matter remitted to the Board. On appeal by the Board to the Court of Appeal, *held*, the appeal should be dismissed.

Whether a board or tribunal's function is characterized as being judicial, *quasi*-judicial or administrative, a duty to act fairly has been recognized where its decision will affect the rights, interests, property or liberties of any person or it will be investigating and making a report that may result in a person being subjected to "pains or penalties" or in some such way adversely affected by the investigation and report. The decision or investigation of the Advisory Review Board is of this kind. The whole purpose of the establishment of an advisory review board was to create an independent body, bringing to its task a considerable and varied expertise of its own, and likely to develop quickly an even greater expertise with the kind of problem assigned to it, with the hoped-for result that no one would be kept indefinitely in a mental institution, half-forgotten, and with his situation unreviewed except by the staff of the institution. It is inherent in the conception and operation of such a board that its recommendations will virtually always be accepted. The Chairman of the Board therefore erred in refusing to disclose any information on the ground that he had no authority to do so. His authority to make disclosure to the applicants' counsel derived from the duty imposed upon him and the other members of the Board to act fairly.

Generally, the Board has a discretion as to how much information it will disclose, depending on the facts of the particular case. However, if lawyers are to properly represent their clients they need to know the substance of the facts placed before the Board although there may be specific facts which for good reason the Board may properly decide should not be revealed. Further, the board may impose terms when disclosure is made. Thus there may be cases where information might be disclosed to a lawyer on terms that it not be disclosed to the client.

[*Nicholson v. Haldimand-Norfolk Regional Board of Com'rs of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N.R. 410; *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 13 C.R. (3d) 1, 30 N.R. 119; *A.-G. Can. v. Inuit Tapirisat of Canada et al.* (1980), 115 D.L.R. (3d) 1, 33 N.R. 304; revg 95 D.L.R. (3d) 665, [1979] 1 F.C. 710, 24 N.R. 361; *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12, consd; *Bates v. Lord Hailsham of Marylebone*, [1972] 3 All E.R. 1019; *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285; *Pearlberg v. Varty*, [1972] 1 W.L.R. 534; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Re Downing and*

Graydon et al. (1978), 21 O.R. (2d) 292, 92 D.L.R. (3d) 355; *Re Webb and Ontario Housing Corp.* (1978), 22 O.R. (2d) 257, 93 D.L.R. (3d) 187; *Re Peterson and Atkinson et al.* (1978), 23 O.R. (2d) 266, 95 D.L.R. (3d) 349; *Re S. & M. Laboratories Ltd. and The Queen in right of Ontario* (1979), 24 O.R. (2d) 732, 99 D.L.R. (3d) 160; *Re Gillingham and Metropolitan Toronto Board of Com'rs of Police* (1979), 26 O.R. (2d) 77, 101 D.L.R. (3d) 570; *Re Proctor and Board of Com'rs of Police of City of Sarnia* (1979), 24 O.R. (2d) 715, 99 D.L.R. (3d) 356; *R. v. Ontario Labour Relations Board, Ex p. Kitchener Food Market Ltd.*, [1966] 2 O.R. 513, 57 D.L.R. (2d) 521, 66 C.L.L.C. 495; *R. v. Statutory Visitors to St. Lawrence's Hospital, Caterham, Ex p. Pritchard*, [1953] 2 All E.R. 766; *Re Pergamon Press Ltd.*, [1971] 1 Ch. 388, refd to]

APPEAL by the Advisory Review Board from a judgment of the Divisional Court, 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304, granting an application for judicial review.

M. Manning, Q.C., for appellant, Advisory Review Board.

D. W. Brown, Q.C., for Attorney-General of Ontario.

P. J. Evraire, for Attorney-General of Canada.

R. D. Manes, for respondents, Robert Abel and Joseph Gallagher.

L. H. Wolfson, for respondents, John Pui, Richard Brian Smith, Brian Williamson, John Lamont and Norman Bignelle.

The judgment of the Court was delivered by

ARNUP J.A.:—In 1967 Ontario established an advisory review board for those psychiatric facilities that had a review board. Since we are concerned solely with the Advisory Review Board, I will hereafter use simply "Board" to designate the Advisory Review Board. The function of the Board is to consider once a year the case of every patient in the psychiatric facility who is detained under the authority of a warrant of the Lieutenant-Governor under the *Criminal Code*, either as a person found not guilty by reason of insanity, or as a person found unfit to stand trial, or as a person who was serving a sentence in a correctional institution and is insane. In addition, the Board must consider the case of any patient of that category upon the written request of the Minister of Health. Upon the conclusion of the Board's inquiry the Chairman must prepare a written report of its recommendations and send it to the Lieutenant-Governor in Council. In his discretion the Chairman may send a copy to any other person.

The Board may hold a hearing, which may be *in camera*. The Board is composed of five members, consisting of a Judge (or retired Judge) of the Supreme Court of Ontario, a barrister and solicitor, two psychiatrists, and a fifth member who is neither a psychiatrist nor a barrister and solicitor. It is the policy of the present Board always to hold a hearing.

Where a hearing is held, the patient may call witnesses and, with the permission of the Chairman, may cross-examine witnesses. In the past few years patients have been retaining lawyers to represent them at the hearing. The Board has encouraged this practice. The issue originally raised in these proceedings concerned the right of the lawyer (and by inference, of the patient) to obtain information from the psychiatric facility, to see its files, and to see the information, reports and recommendations made to the Board by the staff of the facility.

Armed with appropriate directions and releases from their clients, the solicitors for seven patients in the Oak Ridges Division of the Mental Health Centre at Penetanguishene attended at the Centre in July, 1977, and attempted to see the files of their clients in preparation for forthcoming hearings before the Board. Permission was refused by the Centre.

The Board had scheduled hearings for these patients for October 11, 1977. The solicitors meanwhile had launched proceedings in the Divisional Court against the Centre, returnable on November 21, 1977, seeking to compel production of the requested files. On October 11th, counsel for the patients requested the Board to grant an adjournment to a date subsequent to the Divisional Court hearing; this was refused. Counsel then asked the Chairman of the Board to allow him access to the files put before the Board for the purpose of the hearing (which was being held at the Centre). The Chairman (the Honourable Mr. Justice Haines) refused the request, stating that he "had no authority" to do what was asked.

Counsel then requested an adjournment of the hearing so that he could seek judicial review of the Chairman's decision. This was also refused, and the hearings proceeded. Counsel declined to make any submissions, and the patients, on advice of counsel, declined to answer any questions.

The solicitors for the patients then launched a second application to the Divisional Court, seeking judicial review of the Chairman's refusal to allow access to the Board's files. Both applications (referred to in the Divisional Court as "the Centre application" and "the ARB or Board application") were heard together. Judgment was reserved and the judgments given on February 16, 1979, are now reported: 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304. The principal majority judgment was written by Grange J. Southey J. agreed with Grange J., but added some comments of his own concerning the Board application. The majority dismissed the Centre application but in the Board application quashed the decision of the Chairman refusing to order

production of the reports of the officer in charge of the medical facility and ordered that the matter be remitted to the Board "for reconsideration in accordance with the principles set forth in the judgment herein".

O'Driscoll J., in his dissenting judgment reviewed the history of periodic review of cases of persons held under Lieutenant-Governor's warrants, including the establishment of an advisory review board by s. 31 of the *Mental Health Act*, 1967 (Ont.), c. 51 (now R.S.O. 1970, c. 269). He observed that the present Board was appointed by the Lieutenant-Governor in Council in 1977 by O.C. 1486/77 dated May 23, 1977, for a three-year term "under s. 31 of the *Mental Health Act*". He then pointed out the amendments to the *Criminal Code* enacting s. 527A effective October 1, 1969 (now s. 547 as amended [by 1974-75-76, c. 93, s. 71(1) to (4)]), providing that "the lieutenant governor of a province may appoint a board to review the case of every person in custody in a place in that province by virtue of an order made pursuant to section 545 or subsection 546(1) or (2)".

He noted that in the statement filed by Mr. Brown, then appearing for the Director of the Penetanguishene Mental Health Centre, the Supervisor of Clinical Record Services of Penetanguishene Mental Health Centre, the Minister of Health for Ontario, and the Statutory Powers Procedure Rules Committee, the observation had been made that [at p. 285 O.R., p. 349 C.C.C., p. 311 D.L.R.]: " 'The . . . Board is a "Federal Board, commission or other tribunal" and as a result this court does not have jurisdiction'." He agreed with Grange J. that the constitutionality of s. 31 of the *Mental Health Act* and the Board had not been raised but he nevertheless found s. 31 of the *Mental Health Act* was rendered inoperative by the 1969 enactment by Parliament of s. 527A of the *Code* (inadvertently referred to by O'Driscoll J. throughout his judgment as "s. 547A") and said [at p. 286 O.R., p. 350 C.C.C., p. 312 D.L.R.]: "the reference to s. 31 [of the *Mental Health Act*] in the order in council appointing the Advisory Review Board should be taken as a reference to s. 547 of the *Criminal Code* of Canada". This led him to the conclusion that the Board was a "federal board, commission or other tribunal" under s. 2 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), and that under s. 28 of that Act only the Federal Court of Appeal had jurisdiction to review orders of the Board. He then held [at p. 288 O.R., p. 351 C.C.C., p. 313 D.L.R.] that if he was wrong on the jurisdictional point, the Board was not subject to judicial review, since its report did not bind the Lieutenant-Governor in Council and the "minimal rules for proceedings under

the *Statutory Powers Procedure Act*, 1971 (Ont.), c. 47, as amended do not apply". In the result he would have quashed the application brought against the Board.

This Court granted leave to appeal from the order of the Divisional Court respecting the Board application but refused leave to appeal the order dismissing the application against the Centre.

Subsequent to the order granting leave to appeal, Mr. Manning on behalf of the appellant Board served notice under s. 36 of the *Judicature Act*, R.S.O. 1970, c. 228, that he intended to address a constitutional issue which he expressed thus:

> Whether the application for judicial review of the decision of the Chairman of the Advisory Review Board was properly before the Divisional Court of the Supreme Court of Ontario.

This led to the Attorney-General of Canada filing a statement and appearing by counsel. The statement restates the issue in these terms:

> The Attorney General of Canada submits that the constitutional question raised in this appeal is not concerned with the jurisdiction of the Divisional Court, but rather with the issue of whether the Divisional Court ought to have quashed the decision of the Chairman of the Advisory Review Board on the basis that the Chairman's appointment under *The Mental Health Act*, R.S.O. 1970, c. 269, section 31, was invalid having regard to the provisions of section 547 of the *Criminal Code*, R.S.C. 1970, chapter C-34, as amended.

The statement then takes the position that the power to make laws for the custody of persons who are acquitted of criminal charges by reason of insanity, or who are unfit to stand trial, or who become insane while serving a sentence are validly enacted under s. 91, head 27 of the *British North America Act, 1867* (The Criminal Law including Procedure in Criminal Matters) and continues:

> While a province may, in the first instance, validly enact legislation relating to the remand or detention of mentally ill persons, a subsequent federal enactment pursuant to the criminal law power which deals with the same subject matter or the same purpose will render the provincial statute inoperative.

In support of this proposition are cited *Re Fisheries Act, 1914; A.-G. Can. v. A.-G. B.C.*, [1930] 1 D.L.R. 194, [1930] A.C. 111, [1929] 3 W.W.R. 449; *Fawcett v. A.-G. Ont.*, [1964] S.C.R. 625, [1965] 2 C.C.C. 262, 45 D.L.R. (2d) 579, and *Multiple Access Ltd. v. McCutcheon et al.* (1978), 19 O.R. (2d) 516*n*, 86 D.L.R. (3d) 160*n* (Ont. C.A.); affirming 16 O.R. (2d) 593, 78 D.L.R. (3d) 701, 2 B.L.R. 129 (Div. Ct.); reversing 11 O.R. (2d) 249, 65 D.L.R. (3d) 577 (H.C.J.). Under the heading "Order Requested" the statement concluded:

> The Attorney General of Canada respectfully submits that if the determination of this appeal should depend upon the resolution of the constitutional question, the appeal should be dismissed.

Mr. Brown, only five days before the appeal, filed a statement on behalf of the Ministry of Health; he made the submission that the Divisional Court did have jurisdiction to hear the application. He took the position that both s. 31 of the Ontario *Mental Health Act* and s. 547 of the *Criminal Code* were valid, but that the Board had been appointed under s. 31 of the *Mental Health Act*. He then submitted that the Divisional Court had no jurisdiction to review the *reporting* function of the Board (my emphasis). While such a review had been requested, at least inferentially, in the applicants' application to the Divisional Court, the Divisional Court had not dealt with that question. Finally, the statement supported the Board in its contention that ss. 29 and 31 of the *Mental Health Act* provided a "complete scheme whereby [the Board] might conduct its hearings".

When the appeal came on for hearing, Mr. Brown then advised the Registrar that he was appearing only for the Attorney-General for Ontario. When called on to argue, he explained that since the Centre application was no longer in issue, and that application had been the main reason he had appeared before the Divisional Court, he was now appearing only for the Attorney-General. He acknowledged that he had raised in his statement the issue of the existence of both provincial and federal legislation respecting the Board to review the case of patients' health under Lieutenant-Governor's warrant but restated his position that the two statutes were compatible.

In answer to a direct question, he said he was *not* supporting the view of O'Driscoll J. that the Board was a federal board, subject only to the jurisdiction of the Federal Court of Appeal. Mr. Manning had already stated in his argument that no one was supporting that view.

As it turned out, the "federal board" argument did not represent the position of the Attorney-General of Canada either. Mr. Evraire's position seemed to be that when Parliament passed its review board legislation in 1969 the two-year-old Ontario legislation became inoperative in so far as it dealt with such a board. He appeared to go to the length of suggesting that Ontario has had no legally constituted board since 1969. Hence, he said, the Divisional Court had no jurisdiction, not because the Board was a federal one but because there *was* no board. The Lieutenant-Governor has made no appointment which in terms has said it was made pursuant to s. 547 of the *Code*.

Mr. Evraire's underlying concern appeared to be that if the existence and legality of the present Board were recognized, the constitutional doctrine of paramountcy would be threatened in some degree. With respect, the fear is without foundation.

It is true there are some differences between the two statutes. Under s. 547 the Lieutenant-Governor (not the Lieutenant-Governor in Council) appoints the board. This makes no difference in substance, since in Ontario the Lieutenant-Governor in Council is the Lieutenant-Governor acting by and with the advice of the Executive Council of Ontario (the *Interpretation Act*, R.S.O. 1970, c. 225, s. 30, para. 15). The *Criminal Code* provides for a board of not less than three and not more than five persons. Under s. 31 of the *Mental Health Act* the Chairman must be a Judge or a retired Judge. Under the *Code* a Judge could be appointed chairman if a board of five were appointed, but not otherwise, since s. 547 requires the appointment of two psychiatrists and a member of the Bar. The provisions for a quorum are different (three under s. 547, all five under s. 31, with four votes required for any recommendations). Section 547 requires a review within six months after the making of the first order for confinement and annually thereafter. Section 31 requires the first review to be in the year after the warrant was issued. We are told that the present Board now follows the *Code* requirement, a procedure which of course complies also with s. 31. Under s. 547(6) a special review may be ordered by the Lieutenant-Governor. Under s. 31 it is the Minister of Health who can require it.

Section 547 confers on the Chairman the powers of a commissioner under ss. 4 and 5 of the *Inquiries Act*, R.S.C. 1970, c. I-13, but is otherwise silent on procedural matters. Section 29 of the *Mental Health Act*, incorporated into s. 31 by s. 31(7), has several procedural stipulations concerning matters on which s. 547 is silent.

Where both a provincial Legislature and Parliament have jurisdiction to legislate in respect to a matter, and Parliament enacts legislation in relation to a subject upon which a Province has already legislated, those parts of the provincial legislation which are incompatible with the federal legislation are inoperative so long as that incompatibility remains. The degree of incompatibility may be such that the two provisions simply cannot "live together and operate concurrently" to use the language of Judson J. in *O'Grady v. Sparling*, [1960] S.C.R. 804 at p. 811, 128 C.C.C. 1 at pp. 16-7, 25 D.L.R. (2d) 145 at p. 160. These I take to be the views of Morden J. sitting in the Divisional Court, in *Multiple*

Access Ltd. v. McCutcheon (1977), 16 O.R. (2d) 593, 78 D.L.R. (3d) 701, 2 B.L.R. 129. His judgment was expressly adopted by this Court: 19 O.R. (2d) 516*n*, 86 D.L.R. (3d) 160*n*. I refer to what Morden J. said at p. 595 O.R., pp. 703-4 D.L.R., and particularly to his reliance upon *O'Grady v. Sparling*, *supra*.

None of the questions that arise in this case turn upon statutory provisions of provincial legislation that are incompatible with s. 547 of the *Code*. Any differences between the two provisions are not such as to lead to the conclusion that the entire Ontario system for the appointment and operation of an advisory review board has been inoperative since 1969 and that since that year the Board has had no legal existence. Whether any particular provision of the Ontario legislation is compatible with s. 547 of the *Code* to the degree that it must be declared inoperative must await a case in which that issue clearly arises.

Coming then to the merits of the appeal, it is important to keep in mind the limits of the issues now before us. The question of the right of a patient to compel production by the Mental Health Centre of its files and reports is not an issue. Neither is the reviewability of the report and the recommendation of the Board to the Lieutenant-Governor in Council, nor even the right of a patient to receive a copy of it. As already noted, the notice of motion to the Divisional Court requesting judicial review asked for an order in the nature of *certiorari* quashing (or, in the alternative, an order in the nature of a declaration declaring void) any recommendation pertaining to the applicants and arising out of the proceedings before the Board on October 11, 1977, whether or not yet transmitted by the Board to the Lieutenant-Governor in Council, as well as any decision made by the Lieutenant-Governor in Council following the receipt of such recommendation. However, this aspect of the relief requested was not pressed in argument before us.

The Divisional Court has held unanimously that the *Statutory Powers Procedure Act, 1971* does not apply to the proceedings of the Board by reason of s. 3(2)(*g*) of that Act. This finding is not challenged by the respondents. In any event, I agree with it.

We are concerned here only with information, reports and recommendations placed before the Board for its consideration in deciding what recommendations it should make concerning a patient whose case it is reviewing. Most, but not necessarily all, of this material will have come from the "officer in charge" of the Centre (the term comes from the *Mental Health Act*: see ss. 1(*h*) and 29(4)). It is conceded by counsel for the respondents that

there may be some information in the file that may not be in the public interest, or in the interest of the patient, to disclose, and that the chairman has the right and duty to decide this.

Finally, we are not concerned here with what has been called "the full panoply of rights" which the principles of natural justice prescribe for the benefit of those who may be the subject of a decision made by a tribunal acting in a judicial or *quasi*-judicial capacity. It has been said, with justification, by Grange J. in this case, that the persistence of the distinction between judicial and *quasi*-judicial functions on the one hand and those that are considered purely administrative on the other seems to be disappearing in England. In Canada the distinction has clearly become of much less importance since the decision of the Supreme Court of Canada in *Nicholson v. Haldimand-Norfolk Regional Board of Com'rs of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 23 N.R. 410, where the duty to act fairly when performing some kinds of administrative functions was given new importance. (The case was decided after judgment had been reserved by the Divisional Court in the present case but was referred to by Grange J. at the end of his judgment.)

The ramifications of the majority judgment in *Nicholson* are still being explored all over Canada, but the importance of the principle is well illustrated by two later decisions of the Supreme Court of Canada, the first being *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, where Dickson J. at p. 611 S.C.R., p. 365 C.C.C., p. 397 D.L.R., said: ". . . the judgment in *Nicholson*, *supra*, betokens a significant development in our administrative law in its adoption of the English case authorities on the fairness doctrine". I find it noteworthy that Chief Justice Laskin, who wrote the majority judgment in *Nicholson*, agreed with Dickson J. in *Martineau (No. 2)*. While the judgment of Dickson J. is a minority judgment, it is not a dissent, since all nine Judges agreed on the result. The majority judgment was written by Pigeon J. who at p. 634 S.C.R., p. 358 C.C.C., p. 390 D.L.R., referred to the acceptance by the majority of the Court in *Nicholson* of what Megarry J. had said in *Bates v. Lord Hailsham of Marylebone*, [1972] 3 All E.R. 1019 at p. 1024:

> ". . . in the sphere of the so-called quasi-judicial the rules of natural justice run and in the administrative or executive field there is a general duty of fairness."

The judgment of Pigeon J. deals with the case on narrower grounds than the compendious treatment of the developing law found in that of Dickson J. Nevertheless, the majority had no

doubt that *certiorari* would lie to ensure that the duty to act fairly was respected by those making decisions "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis".

The last-quoted words are found in s. 28 of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), dealing with the jurisdiction of the Federal Court of Appeal. The Supreme Court had agreed with the Federal Court of Appeal in *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, that the disciplinary decision of the Inmate Disciplinary Board of a federal correctional institution was [p. 120 S.C.R., p. 372 C.C.C., p. 7 D.L.R.] " 'of an administrative nature not required by law to be made on a judicial or quasi-judicial basis' " and was, therefore, not subject to review under s. 28 of the *Federal Court Act*. That section preserves in statutory form the old distinction which I have said no longer has its former significance at common law.

Since this appeal was argued, the Supreme Court of Canada has given judgment in *A.-G. Can. v. Inuit Tapirisat of Canada et al.* October 7, 1980 [since reported 115 D.L.R. (3d) 1, 33 N.R. 304]; reversing the Federal Court of Appeal, 95 D.L.R. (3d) 665, [1979] 1 F.C. 710, 24 N.R. 361. Estey J., writing the unanimous judgment of the Court, dealt with the nature of the duty to be fair. The issue concerned the duty, if any, of the Governor in Council to observe natural justice "or at least a lesser duty of fairness" when the Governor in Council was dealing with parties such as the respondents upon their submission of a petition under s. 64 of the *National Transportation Act*, R.S.C. 1970, c. N-17, as amended.

Estey J. quoted from the majority judgment of Laskin C.J.C. in *Nicholson*, referred to the decision of the House of Lords in *Pearlberg v. Varty*, [1972] 1 W.L.R. 534, and to the much-quoted judgment of Tucker L.J. in *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 at p. 119. He then quoted the following passage from the judgment of Lord Denning M.R. in *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 at p. 19, dealing with tribunals called upon to investigate and report (or recommend):

> In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

In discussing the alleged failure of the Governor in Council to fulfil the duty to be fair, Estey J. said [at p. 13]:

> While, after *Nicholson, supra*, and *Martineau v. Matsqui Institution Disciplinary Board (No. 2)* (decision of this Court handed down December 13, 1979, reported at 106 D.L.R. (3d) 385, 50 C.C.C. (2d) 353, [1980] 1 S.C.R. 602), the existence of such a duty no longer depends on classifying the power involved as "administrative" or "*quasi*-judicial," it is still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness.

Towards the end of his judgment, he said [at p. 19]:

> The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle as in *Nicholson, supra*, will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a *lis* or where the agency may be described as an "investigating body" as in the *Selvarajan* case, *supra*.

The conclusion of the Supreme Court was that the function of the Governor in Council was essentially legislative rather than either judicial or administrative. The importance of the case for our purposes is that it recognizes once more the existence of the duty of fairness required of a tribunal which is either going to give a decision affecting "the rights, interests, property, privileges or liberties of any person" [at p. 623 S.C.R., p. 373 C.C.C., p. 405 D.L.R.] (*per* Dickson J. below) or is going to investigate and make a report that may result in a person being "subjected to pains or penalties . . . or in some such way adversely affected by the investigation and report" (*Selvarajan, supra* [at p. 19]).

The Ontario cases since *Nicholson* were already approaching this position, some rather tentatively, others in clear terms. Without elaboration I mention *Re Downing and Graydon et al.* (1978), 21 O.R. (2d) 292, 92 D.L.R. (3d) 355 (Ont. C.A.); *Re Webb and Ontario Housing Corp.* (1978), 22 O.R. (2d) 257, 93 D.L.R. (3d) 187 (Ont. C.A.); *Re Peterson and Atkinson et al.* (1978), 23 O.R. (2d) 266, 95 D.L.R. (3d) 349 (Ont. Div. Ct.); *Re S. & M. Laboratories Ltd. and The Queen in right of Ontario* (1979), 24 O.R. (2d) 732, 99 D.L.R. (3d) 160 (Ont. C.A.); *Re Gillingham and Metropolitan Toronto Board of Com'rs of Police* (1979), 26 O.R. (2d) 77, 101 D.L.R. (3d) 570 (Ont. Div. Ct.); *Re Proctor and Board of Com'rs of Police of City of Sarnia* (1979), 24 O.R. (2d) 715, 99 D.L.R. (3d) 356 (Ont. C.A.). There are additional cases of this Court not yet reported.

Does Ontario's Advisory Review Board make a "decision", which brings into play the requirement that it act fairly?

O'Driscoll J. held that it did not, relying on s. 3(2)(*g*) of the *Statutory Powers Procedure Act*, and *R. v. Ontario Labour Relations Board, Ex p. Kitchener Food Market Ltd.*, [1966] 2 O.R. 513, 57 D.L.R. (2d) 521, 66 C.L.L.C. 495, in which Laskin J.A. had referred to *R. v. Statutory Visitors to St. Laurence's Hospital, Caterham, Ex p. Pritchard*, [1953] 2 All E.R. 766. The view enunciated by O'Driscoll J. forms the principal argument of the appellant Board. I do not accept this position.

In *Martineau (No. 2), supra*, Dickson J. said at pp. 622-3 S.C.R., p. 373 C.C.C., p. 405 D.L.R.:

> In my opinion, *certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges or liberties of any person.

In my view, the Board has power to decide such a question. Grange J. observed (24 O.R. (2d) 279 at p. 292, 46 C.C.C. (2d) 342 at p. 356, 97 D.L.R. (3d) 304 at p. 318):

> The Lieutenant Governor is, of course, not bound to act upon the recommendations in the report, but I do not think I go too far — indeed I think I only state the obvious — when I say that a patient's only hope of release lies in a favourable recommendation by the Board.
>
> Just as the Lieutenant-Governor need not act upon the Board's report so the Board need not act upon the information and reports of the officer in charge, but there can be no question that these will influence the Board and may in many cases be decisive. If counsel for the patient seeks, as he must, to represent his client properly, one can well understand his desire, even his imperative need, to examine such reports.

I agree completely with these comments, but I would go even further. The whole purpose of the establishment of an advisory review board was to create an independent body, bringing to its task a considerable and varied expertise of its own, and likely to develop quickly an even greater expertise with the kind of problem assigned to it, with the hoped-for result that no one would be kept indefinitely in a mental institution, half-forgotten, and with his situation unreviewed except by the staff of the institution. It is inherent in the conception and operation of such a board that its recommendations will virtually always be accepted. Alternatively, the Board's functions are of the investigatory nature spoken of by Lord Denning in the *Selvarajan* case in the passage already quoted. The consequences of its recommendations are to some degree analogous to those flowing from the report of the inspectors of the Board of Trade in England, as described by Lord Denning in *Re Pergamon Press Ltd.*, [1971] 1 Ch. 388 at pp. 399-400, quoted by Grange J. at p. 293 O.R., pp. 356-7 C.C.C., pp. 318-9 D.L.R.:

"He [counsel for the inspectors] said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply. He cited *Parry-Jones v. Law Society* [1969] 1 Ch. 1 to support his proposition.

"I cannot accept Mr. Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see *In re Grosvenor & West-End Railway Terminus Hotel Co. Ltd.* (1897) 76 L.T. 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see *Hearts of Oak Assurance Co. Ltd. v. Attorney-General* (1932) A.C. 392. They do not even decide whether there is a prima facie case, as was done in *Wiseman v. Borneman* [1971] A.C. 297.

"But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up, see *In re S.B.A. Properties Ltd.* [1967] 1 W.L.R. 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence had been committed: see section 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the Board may, in their discretion, publish it, if they think fit, to the public at large.

"Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see *Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice."

The Chairman of the Board refused to disclose any information because he "had no authority to do so". He *did* have authority. It was derived from the duty imposed upon him and the other members of the Board to act fairly — a duty imposed by law. His decision to refuse all disclosure was, therefore, properly quashed by the Divisional Court.

What is the extent of the duty imposed on the Board to act fairly? I would echo the note of caution expressed by Southey J. at the conclusion of his reasons as to the "extremely sensitive area" in which the Board functions. I would, therefore, venture to express only certain general guidelines, because in my view, the Board, in every case in which it is asked for information, has a discretion which must be exercised having regard to the facts of

that case. Furthermore, we have heard an appeal in one particular case. We are not called upon to promulgate specific rules of procedure for the Board. A means of doing that already exists.

In the first place, we are dealing with a situation where lawyers have been retained to represent seven patients at a hearing to conduct the annual review of what the statute calls their "case". The Board has to decide what to do with them — to recommend that their confinement continue? that they be allowed some supervised freedom under a "loosened warrant"? that they be released forthwith or on a specified future date?

The Board has to obtain the facts to which it is going to apply its mind. If lawyers are going to represent their patient-clients adequately, they need to know the substance of those facts (as Lord Denning said in *Pergamon*, *supra*, the Board "need not quote chapter and verse"). There may be good reason why some of the specific facts should not be revealed. This is for the Board to decide. The Chairman, if he requests the officer in charge to provide information for the purpose of an inquiry, pursuant to s. 29(4) of the *Mental Health Act*, obviously should not "tailor" his requests to the Centre so that he will not be given what he does not want to reveal. On the other hand, what he feels the Board needs is not necessarily what he may decide should be given to the lawyers.

What terms, if any, should be imposed when disclosure is made is also a matter for the Board to decide. While it may place the lawyers in an awkward situation, one can envisage cases where information might be disclosed on terms that it not be disclosed to the client.

The 1978 amendment

In 1978 the Legislature enacted *An Act to amend the Mental Health Act*, 1978 (Ont.), c. 50. The amendment introduced important changes respecting "involuntary patients", defined as persons detained in a psychiatric facility under a certificate of involuntary admission. It put into the Act provisions concerning "clinical records", and prohibitions against their disclosure except to specified classes of persons. It created "regional review boards", prescribed detailed procedural requirements and rights with respect to hearings by such boards, and gave a right of appeal to the County Court. Much of this was done by s. 11 of the 1978 Act, which repealed ss. 28, 29 and 30 of the existing Act, and substituted nine sections, including a quite different s. 29 of which the side-note says: "Effective [*sic*] of certificate."

If all of the 1978 enactment had become law, the reference in s. 31(7) of the *Mental Health Act* ("Section 29 applies *mutatis*

mutandis to cases under this section"), would have been meaningless, since the new s. 29 relates to an entirely different subject-matter. However, the 1978 Act was expressed to come into force on a day to be named by proclamation of the Lieutenant-Governor.

A proclamation dated September 20, 1978, was issued. (It originally was published in the Ontario Gazette of October 14, 1978; a corrected version was published in the Ontario Gazette of October 28, 1978.) As corrected the operative paragraphs of the proclamation are:

> WHEREAS by an Act passed at the Second Session of the Thirty-first Legislature of Ontario convened on the twenty-first day of February, 1978 intituled The Mental Health Amendment Act, 1978, it is enacted by Section 20 thereof that the said Act shall come into force on a day to be named by Our Lieutenant Governor by her Proclamation;
>
> AND WHEREAS it has appeared expedient that a Proclamation should now issue bringing the said Act except section 11 thereof, and the said section 11 with the exception of:
>
> (*a*) the reference to sections 29 and 30 of The Mental Health Act in the first line of the said section 11; and
>
> (*b*) subsections 1 and 2 of section 28 and sections 29 to 30*f* both inclusive of The Mental Health Act as enacted by the said section 11
>
> into force;
>
> NOW THEREFORE KNOW YE that, having taken the premises into Our Royal consideration, We, by and with the advice of Our Executive Council of Our Province of Ontario and in the exercise of the power in US vested in this behalf by the said Act or otherwise howsoever, Do, by this Our Royal PROCLAMATION hereby Name Wednesday, the first day of November, 1978 as the day upon which The Mental Health Amendment Act, 1978 except section 11 thereof shall come into force and as the day upon which the said section 11 with the exception of,
>
> (*a*) the reference to sections 29 and 30 of The Mental Health Act in the first line of the said section 11; and
>
> (*b*) subsections 1 and 2 of section 28 and sections 29 to 30*f* both inclusive of The Mental Health Act as enacted by the said section 11
>
> shall come into force.

Therefore, the 1978 Act, in so far as it repealed s. 29 of the *Mental Health Act*, has not come into force, and s. 29 as incorporated into s. 31 continues in the same form. Hence the references in the reasons of the Divisional Court and in these reasons to the statutory procedures of the Board are still appropriate.

I would assume that before that part of s. 11 of the 1978 Act that repeals s. 29 of the *Mental Health Act* is brought in force, appropriate amendments will be made so that the incorporation by reference found in s. 31(7) of the *Mental Health Act* will be of

provisions that are compatible with the rest of s. 31 or else that s. 31 will be amended to contain such procedural provisions as are deemed appropriate.

Conclusion

In the result I would dismiss the appeal with costs payable by the appellant to the respondents. There should be no costs to or against either Attorney-General.

Appeal dismissed.

Appendix M

Canada Act

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act*.

Loi donnant suite à une demande du Sénat et de la Chambre des communes du Canada

Sa Très Excellente Majesté la Reine, considérant :

qu'à la demande et avec le consentement du Canada, le Parlement du Royaume-Uni est invité à adopter une loi visant à donner effet aux dispositions énoncées ci-après et que le Sénat et la Chambre des communes du Canada réunis en Parlement ont présenté une adresse demandant à Sa Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi à cette fin,

sur l'avis et du consentement des Lords spirituels et temporels et des Communes réunis en Parlement, et par l'autorité de celui-ci, édicte :

1. La *Loi constitutionnelle de 1982*, énoncée à l'annexe B, est édictée pour le Canada et y a force de loi. Elle entre en vigueur conformément à ses dispositions.

2. Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la *Loi constitutionnelle de 1982* ne font pas partie du droit du Canada.

3. La partie de la version française de la présente loi qui figure à l'annexe A a force de loi au Canada au même titre que la version anglaise correspondante.

4. Titre abrégé de la présente loi : *Loi sur le Canada*.

Constitution Act, 1982
Loi constitutionelle de 1982

SCHEDULE B

CONSTITUTION ACT, 1982

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House

ANNEXE B

LOI CONSTITUTIONNELLE DE 1982

PARTIE I
CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association.

Droits démocratiques

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse

of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative.

5. Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois.

Liberté de circulation et d'établissement

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;

b) de gagner leur vie dans toute province.

(3) Les droits mentionnés au paragraphe (2) sont subordonnés :

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

Garanties juridiques

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

10. Chacun a le droit, en cas d'arrestation ou de détention :

(*a*) to be informed promptly of the reasons therefor;
(*b*) to retain and instruct counsel without delay and to be informed of that right; and
(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

11. Any person charged with an offence has the right
(*a*) to be informed without unreasonable delay of the specific offence;
(*b*) to be tried within a reasonable time;
(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;
(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;
b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;
c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

11. Tout inculpé a le droit :
a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;
b) d'être jugé dans un délai raisonnable;
c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;
d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;
e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;
f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;
g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;
h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;
i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Droits à l'égalité

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Langues officielles du Canada

16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

(2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.

(2) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

17. (1) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux du Parlement.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

(2) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux de la Législature du Nouveau-Brunswick.

18. (1) Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.

(2) Les lois, les archives, les comptes rendus et les procès-verbaux de la Législature du Nouveau-Brunswick sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.

19. (1) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.

(2) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux du Nouveau-Brunswick et dans tous les actes de procédure qui en découlent.

20. (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français ou de l'anglais fait l'objet d'une demande importante;

b) l'emploi du français et de l'anglais se justifie par la vocation du bureau.

(2) Le public a, au Nouveau-Brunswick, droit à l'emploi du français ou de l'anglais pour communiquer avec tout bureau des institutions de la législature ou du gouvernement ou pour en recevoir les services.

21. Les articles 16 à 20 n'ont pas pour effet, en ce qui a trait à la langue française ou anglaise ou à ces deux langues, de porter atteinte aux droits, privilèges ou obligations qui existent ou sont maintenus aux termes d'une autre disposition de la Constitution du Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

22. Les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges, antérieurs ou postérieurs à l'entrée en vigueur de la présente charte et découlant de la loi ou de la coutume, des langues autres que le français ou l'anglais.

Minority Language Educational Rights

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Droits à l'instruction dans la langue de la minorité

23. (1) Les citoyens canadiens :

a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy

Recours

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour ob-

as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

tenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Dispositions générales

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés acquis par règlement de revendications territoriales.

26. Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits ou libertés qui existent au Canada.

27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

29. Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la Constitution du Canada concernant les écoles séparées et autres écoles confessionnelles.

30. Dans la présente charte, les dispositions qui visent les provinces, leur législature ou leur assemblée législative visent également le territoire du Yukon, les territoires du Nord-Ouest ou leurs autorités législatives compétentes.

31. La présente charte n'élargit pas les compétences législatives de quelque organisme ou autorité que ce soit.

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms.*

Application de la charte

32. (1) La présente charte s'applique :

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

(2) Par dérogation au paragraphe (1), l'article 15 n'a d'effet que trois ans après l'entrée en vigueur du présent article.

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Titre

34. Titre de présente partie : *Charte canadienne des droits et libertés.*

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

PARTIE II

DROITS DES PEUPLES AUTOCHTONES DU CANADA

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, «peuples autochtones du Canada» s'entend notamment des Indiens, des Inuit et des Métis du Canada.

PART III

EQUALIZATION AND REGIONAL DISPARITIES

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

PARTIE III

PÉRÉQUATION ET INÉGALITÉS RÉGIONALES

36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

b) favoriser le développement économique pour réduire l'inégalité des chances;

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

PART IV

CONSTITUTIONAL CONFERENCE

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PARTIE IV

CONFÉRENCE CONSTITUTIONNELLE

37. (1) Dans l'année suivant l'entrée en vigueur de la présente partie, le premier ministre du Canada convoque une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même.

(2) Sont placées à l'ordre du jour de la conférence visée au paragraphe (1) les questions constitutionnelles qui intéressent directement les peuples autochtones du Canada, notamment la détermination et la définition des droits de ces peuples à inscrire dans la Constitution du Canada. Le premier ministre du Canada invite leurs représentants à participer aux travaux relatifs à ces questions.

(3) Le premier ministre du Canada invite des représentants élus des gouvernements du territoire du Yukon et des territoires du Nord-Ouest à participer aux travaux relatifs à toute question placée à l'ordre du jour de la conférence visée au paragraphe (1) et qui, selon lui, intéresse directement le territoire du Yukon et les territoires du Nord-Ouest.

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent hereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

40. Where an amendment is made under subsection 38(1) that transfers provincial

PARTIE V

PROCÉDURE DE MODIFICATION DE LA CONSTITUTION DU CANADA

38. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée à la fois :

a) par des résolutions du Sénat et de la Chambre des communes;

b) par des résolutions des assemblées législatives d'au moins deux tiers des provinces dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins cinquante pour cent de la population de toutes les provinces.

(2) Une modification faite conformément au paragraphe (1) mais dérogatoire à la compétence législative, aux droits de propriété ou à tous autres droits ou privilèges d'une législature ou d'un gouvernement provincial exige une résolution adoptée à la majorité des sénateurs, des députés fédéraux et des députés de chacune des assemblées législatives du nombre requis de provinces.

(3) La modification visée au paragraphe (2) est sans effet dans une province dont l'assemblée législative a, avant la prise de la proclamation, exprimé son désaccord par une résolution adoptée à la majorité des députés, sauf si cette assemblée, par résolution également adoptée à la majorité, revient sur son désaccord et autorise la modification.

(4) La résolution de désaccord visée au paragraphe (3) peut être révoquée à tout moment, indépendamment de la date de la proclamation à laquelle elle se rapporte.

39. (1) La proclamation visée au paragraphe 38(1) ne peut être prise dans l'année suivant l'adoption de la résolution à l'origine de la procédure de modification que si l'assemblée législative de chaque province a préalablement adopté une résolution d'agrément ou de désaccord.

(2) La proclamation visée au paragraphe 38(1) ne peut être prise que dans les trois ans suivant l'adoption de la résolution à l'origine de la procédure de modification.

40. Le Canada fournit une juste compensation aux provinces auxquelles ne s'appli-

legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

que pas une modification faite conformément au paragraphe 38(1) et relative, en matière d'éducation ou dans d'autres domaines culturels, à un transfert de compétences législatives provinciales au Parlement.

41. Toute modification de la Constitution du Canada portant sur les questions suivantes se fait par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province :

a) la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur;

b) le droit d'une province d'avoir à la Chambre des communes un nombre de députés au moins égal à celui des sénateurs par lesquels elle est habilitée à être représentée lors de l'entrée en vigueur de la présente partie;

c) sous réserve de l'article 43, l'usage du français ou de l'anglais;

d) la composition de la Cour suprême du Canada;

e) la modification de la présente partie.

42. (1) Toute modification de la Constitution du Canada portant sur les questions suivantes se fait conformément au paragraphe 38(1) :

a) le principe de la représentation proportionnelle des provinces à la Chambre des communes prévu par la Constitution du Canada;

b) les pouvoirs du Sénat et le mode de sélection des sénateurs;

c) le nombre des sénateurs par lesquels une province est habilitée à être représentée et les conditions de résidence qu'ils doivent remplir;

d) sous réserve de l'alinéa 41*d*), la Cour suprême du Canada;

e) le rattachement aux provinces existantes de tout ou partie des territoires;

f) par dérogation à toute autre loi ou usage, la création de provinces.

(2) Les paragraphes 38(2) à (4) ne s'appliquent pas aux questions mentionnées au paragraphe (1).

43. Les dispositions de la Constitution du Canada applicables à certaines provinces seulement ne peuvent être modifiées que par proclamation du gouverneur général sous le

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province concernée. Le présent article s'applique notamment :

a) aux changements du tracé des frontières interprovinciales;

b) aux modifications des dispositions relatives à l'usage du français ou de l'anglais dans une province.

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

44. Sous réserve des articles 41 et 42, le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat ou à la Chambre des communes.

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

45. Sous réserve de l'article 41, une législature a compétence exclusive pour modifier la constitution de sa province.

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

46. (1) L'initiative des procédures de modification visées aux articles 38, 41, 42 et 43 appartient au Sénat, à la Chambre des communes ou à une assemblée législative.

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

(2) Un résolution d'agrément adoptée dans le cadre de la présente partie peut être révoquée à tout moment avant la date de la proclamation qu'elle autorise.

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

47. (1) Dans les cas visés à l'article 38, 41, 42 ou 43, il peut être passé outre au défaut d'autorisation du Sénat si celui-ci n'a pas adopté de résolution dans un délai de cent quatre-vingts jours suivant l'adoption de celle de la Chambre des communes et si cette dernière, après l'expiration du délai, adopte une nouvelle résolution dans le même sens.

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

(2) Dans la computation du délai visé au paragraphe (1), ne sont pas comptées les périodes pendant lesquelles le Parlement est prorogé ou dissous.

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

48. Le Conseil privé de la Reine pour le Canada demande au gouverneur général de prendre, conformément à la présente partie, une proclamation dès d'adoption des résolutions prévues par cette partie pour une modification par proclamation.

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened

49. Dans les quinze ans suivant l'entrée en vigueur de la présente partie, le premier ministre du Canada convoque une con-

by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

50. The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"*Non-Renewable Natural Resources, Forestry Resources and Electrical Energy*

92A. (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

férence constitutionnelle réunissant les premiers ministres provinciaux et lui-même, en vue du réexamen des dispositions de cette partie.

PARTIE VI

MODIFICATION DE LA LOI CONSTITUTIONNELLE DE 1867

50. La *Loi constitutionnelle de 1867* (antérieurement désignée sous le titre : *Acte de l'Amérique du Nord britannique, 1867*) est modifiée par insertion, après l'article 92, de la rubrique et de l'article suivants :

«*Ressources naturelles non renouvelables, ressources forestières et énergie électrique*

92A. (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivantes :

a) prospection des ressources naturelles non renouvelables de la province;

b) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;

c) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique.

(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement adoptée dans ces domaines l'emportant sur les dispositions incompatibles d'une loi provinciale.

(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation :

(*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

51. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(*a*) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(*b*) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood

a) des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production primaire qui en est tirée;

b) des emplacements et des installations de la province destinés à la production d'énergie électrique, ainsi que de cette production même.

Cette compétence peut s'exercer indépendamment du fait que la production en cause soit ou non, en totalité ou en partie, exportée hors de la province, mais les lois adoptées dans ces domaines ne peuvent autoriser ou prévoir une taxation qui établisse une distinction entre la production exportée à destination d'une autre partie du Canada et la production non exportée hors de la province.

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le gouvernement d'une province lors de l'entrée en vigueur du présent article.»

51. Ladite loi est en outre modifiée par adjonction de l'annexe suivante :

«SIXIÈME ANNEXE

Production primaire tirée des ressources naturelles non renouvelables et des ressources forestières

1. Pour l'application de l'article 92A :

a) on entend par production primaire tirée d'une ressource naturelle non renouvelable :

(i) soit le produit qui se présente sous la même forme que lors de son extraction du milieu naturel,

(ii) soit le produit non manufacturé de la transformation, du raffinage ou de l'affinage d'une ressource, à l'exception du produit du raffinage du pétrole brut, du raffinage du pétrole brut lourd amélioré, du raffinage des gaz ou des liquides dérivés du charbon ou du raffinage d'un équivalent synthétique du pétrole brut;

b) on entend par production primaire tirée d'une ressource forestière la production constituée de billots, de poteaux, de bois d'oeuvre, de copeaux, de sciure ou

product, or wood pulp, and is not a product manufactured from wood."

d'autre produit primaire du bois, ou de pâte de bois, à l'exception d'un produit manufacturé en bois.»

PART VII

GENERAL

PARTIE VII

DISPOSITIONS GÉNÉRALES

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

(2) The Constitution of Canada includes

(*a*) the *Canada Act*, including this Act;

(*b*) the Acts and orders referred to in Schedule I; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

(2) La Constitution du Canada comprend :

a) la *Loi sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe I;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

53. (1) The enactments referred to in Column I of Schedule I are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

53. (1) Les textes législatif et les décrets énumérés à la colonne I de l'annexe I sont abrogés ou modifiés dans la mesure indiquée à la colonne II. Sauf abrogation, ils restent en vigueur en tant que lois du Canada sous les titres mentionnés à la colonne III.

(2) Every enactment, except the *Canada Act*, that refers to an enactment referred to in Schedule I by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in Schedule I may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

(2) Tout texte législatif ou règlementaire, sauf la *Loi sur le Canada*, qui fait mention d'un texte législatif ou décret figurant à l'annexe I par le titre indiqué à la colonne I est modifié par substitution à ce titre du titre correspondant mentionné à la colonne III; tout Acte de l'Amerique du Nord britannique non mentionné à l'annexe I peut être cité sous le titre de *Loi constitutionnelle* suivi de l'indication de l'année de son adoption et éventuellement de son numéro.

54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequential upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

54. La partie IV est abrogée un an après l'entrée en vigueur de la présente partie et le gouverneur général peut, par proclamation sous le grand sceau du Canada, abroger le présent article et apporter en conséquence de cette double abrogation les aménagements qui s'imposent à la présente loi.

55. A French version of the portions of the Constitution of Canada referred to in Schedule I shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe I; toute partie suffisamment importante

to warrant action being taken has been so prepared, it will be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

57. The English and French versions of this Act are equally authoritative.

58. Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

59. (1) Paragraph 23(1)(*a*) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.

(3) This section may be repealed on the day paragraph 23(1)(*a*) comes into force in respect of Quebec and this Act amended and renumbered, consequential upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

60. This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

56. Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 55, d'une partie et la version française de la Constitution, cette partie et la version anglaise correspondante.

57. Les versions française et anglaise de la présente loi ont également force de loi.

58. Sous réserve de l'article 59, la présente loi entre en vigueur à la date fixée par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada.

59. (1) L'alinéa 23(1)*a*) centre en vigueur pour le Québec à la date fixée par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada.

(2) La proclamation visée au paragraphe (1) ne peut être prise qu'après autorisation de l'assemblée législative ou du gouvernement du Québec.

(3) Le présent article peut être abrogé à la date d'entrée en vigueur de l'alinéa 23(1)*a*) pour le Québec, et la présente loi faire l'objet, dès cette abrogation, des modifications et changements de numérotation qui en découlent, par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada.

60. Titre abrégé de la présente annexe : *Loi constitutionnelle de 1982*; titre commun des lois constitutionnelles de 1867 à 1975 (n° 2) et de la présente loi : *Loi constitutionnelles de 1867 à 1982*.

Appendix N

Canadian Bill of Rights
Déclaration canadienne des droits

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms

8-9 Elizabeth II, c. 44 (Canada)

[Assented to 10th August 1960]

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

BILL OF RIGHTS

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, re-

Loi ayant pour objets la reconnaissance et la protection des droits de l'homme et des libertés fondamentales

8-9 Elizabeth II, c. 44 (Canada)

[Sanctionnée le 10 août 1960]

Le Parlement du Canada proclame que la nation reconnaissent la suprématie de Dieu, la dignité et la valeur de la personne humaine ainsi que le rôle de la famille dans une société d'hommes libres et d'institutions libres;

Il proclame en outre que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire du respect des valeurs morales et spirituelles et du règne du droit;

Et afin d'expliciter ces principes ainsi que les droits de l'homme et les libertés fondamentales qui en découlent, dans une Déclaration de droits qui respecte la compétence législative du Parlement du Canada et qui assure à sa population la protection de ces droits et de ces libertés,

En conséquence, Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète :

PARTIE I

DÉCLARATION DES DROITS

1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales ci-après énoncés ont existé et continueront à exister pour tout

ligion or sex, the following human rights and fundamental freedoms, namely,

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(*b*) the right of the individual to equality before the law and the protection of the law;

(*c*) freedom of religion;

(*d*) freedom of speech;

(*e*) freedom of assembly and association; and

(*f*) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing

individu au Canada quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe :

a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi;

b) le droit de l'individu à l'égalité devant la loi et à la protection de la loi;

c) la liberté de religion;

d) la liberté de parole;

e) la liberté de réunion et d'association, et

f) la liberté de la presse.

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

a) autorisant ou prononçant la détention, l'emprisonnement ou l'exil arbitraires de qui que ce soit;

b) infligeant des peines ou traitements cruels et inusités, ou comme en autorisant l'imposition;

c) privant une personne arrêtée ou détenue

(i) du droit d'être promptement informée des motifs de son arrestation ou de sa détention,

(ii) du droit de retenir et constituer un avocat sans délai, ou

(iii) du recours par voie d'*habeas corpus* pour qu'il soit jugé de la validité de sa détention et que sa libération soit ordonnée si la détention n'est pas légale;

d) autorisant une cour, un tribunal, une commission, un office, un conseil ou une autre autorité à contraindre une personne à témoigner si on lui refuse le secours d'un avocat, la protection contre son propre témoignage ou l'exercice de toute garantie d'ordre constitutionnel;

e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la

by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

définition de ses droits et obligations;

f) privant une personne accusée d'un acte criminel du droit á la présomption d'innocence jusqu'à ce que la preuve de sa culpabilité ait été établie en conformité de la loi, après une audition impartiale et publique de sa cause par un tribunal indépendant et non préjugé, ou la privant sans juste cause du droit à un cautionnement raisonnable; ou

g) privant une personne du droit à l'assistance d'un interprète dans des procédures où elle est mise en cause ou est partie ou témoin, devant une cour, une commission, un office, un conseil ou autre tribunal, si elle ne comprend ou ne parle pas la langue dans laquelle se déroulent ces procédures.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

3. Le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner toute proposition de règlement soumise, sous forme d'avant-projet, au greffier du Conseil privé, selon la *Loi sur les règlements*, comme tout projet ou proposition de loi soumis ou présenté à la Chambre des communes, en vue de constater si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

4. Les dispositions de la présente Partie doivent être connues sous la désignation : *Déclaration canadienne des droits*.

PART II

PARTIE II

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

5. (1) Aucune disposition de la Partie I ne doit s'interpréter de manière à supprimer ou restreindre l'exercice d'un droit de l'homme ou d'une liberté fondamentale non énumérés dans ladite Partie et qui peuvent avoir existé au Canada lors de la mise en vigueur de la présente loi.

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

(2) L'expression «loi du Canada», à la Partie I, désigne une loi du Parlement du Canada, édictée avant ou après la mise en vigueur de la présente loi, ou toute ordonnance, règle ou règlement établi sous son régime, et toute loi exécutoire au Canada ou dans une partie du Canada lors de l'entrée en application de la présente loi, qui est susceptible d'abrogation, d'abolition ou de modification par le Parlement du Canada.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

(3) Les dispositions de la Partie I doivent s'interpréter comme ne visant que les matières qui sont de la compétence législative du Parlement du Canada.